107

No. 08-522

Supreme Court, U.S.
FILED
OCT 17 2008

OFFICE OF THE CLERK

In The

Supreme Court Of The United States

SANDRA BOYETT, ET AL.,
Petitioners,

v.

WASHINGTON COUNTY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EDWARD P. MORIARITY
* SHANDOR S. BADARUDDIN
Moriarity, Badaruddin & Booke, LLC
124 West Pine Street
Missoula, MT 59802
(406) 728-6868

* *Counsel of Record*

QUESTION PRESENTED

Introductory Statement: Petitioners claimed that the death of their decedent was caused by the exercise of excessive force by Respondents. Petitioners produced little or no direct evidence, and sought to prove this claim exclusively by circumstantial evidence.

Question Presented: Can a citizen, alleging a claim of excessive force and a violation of his civil rights under 42 U.S.C. §1983, rely exclusively on circumstantial evidence to meet his burden of proof.

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioners:

1. Sandra Boyett
2. Jessica Peterson,
3. Brandy Sorensen.

Respondents:

4. Washington County, (State of Utah)
5. Washington County Purgatory Correctional Facility,
6. Washington County Sheriff's Office,
7. Sheriff Kirk Smith
8. Chief Deputy Sheriff Robert Tersigni,
9. James Hanson
10. Destiny Hummer
11. Fred Keil
12. Ray J. Kounalis
13. Gene Redford
14. Sabrina Steel
15. Darryl McCoy
16. Randy McKinnon
17. John Worlton
18. Dave Patt

TABLE OF CONTENTS

Question Presented i

List of all Parties to the Proceeding..... ii

Table of Authorities..... iv

Petition Introduction..... 1

Opinions Below..... 1

Statement of Jurisdiction..... 3

Constitutional & Statutory Provisions Involved..... 4

Statement of the Case..... 5

Reasons for Granting the Writ..... 10

Conclusion..... 14

TABLE OF AUTHORITIES

AUTHORITY	PG.
42 USC §1983	4 12 13
U.S. Const. amend. IV	4
28 USC § 1331	5
28 USC § 1343(a)	5
28 USC § 1291	5
28 U.S.C. § 1254(1)	3
Boyett v. County of Washington, 2006 WL 335605 (D. Utah)	1
Boyett v. County of Washington, 2006 WL 1129394 (D. Utah)	1
Boyett v. County of Washington, 2006 WL 3422104 (D. Utah)	1
Boyett v. County of Washington, 2006 WL 2483286 (C.A.10 (Utah))	2

AUTHORITY	PG.
9th Cir Model Instruction No. 1.9 (2007 Rev.).....	11
3rd Cir Model Instruction No. 1.6 (2008 Rev.).....	11
5th Cir Model Instruction No. 2.18 (1999 Rev.).....	11
7th Circuit Model Instruction No. 1.12 (2005 Rev.).....	11
8th Circuit Model Instruction No. 1.02 (2007 and 2008 proposed).....	11
11th Circuit Model Instruction No. 2.1 (2005 Rev.).....	11
Hudson v. McMillan, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992).....	11
Holland v. United States, 348 U.S. 121, 138, 75 S.Ct. 127, 99 L.Ed. 150 (1954).....	12 13 14
Desert Palace, Inc. v. Costa, 539 U.S. 90, 100, 123 S.Ct 2148, 2154 (2003).....	12 14

PETITION FOR WRIT OF CERTIORARI

Petitioners Sandra Boyett, Jessica Peterson and Brandi Sorenson, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the District Of Utah, Central Division, Honorable Paul G. Cassell, granting defendant Randy McKinnon's Motion for Summary Judgment. This opinion is not reported in the F.Supp.2d. It is reported at 2006 WL 335605 (D. Utah).

The opinion of the United States District Court for the District Of Utah, Central Division, Honorable Paul G. Cassell, granting Defendants Fred Keil's and Jon Worlton's Motion for Summary Judgment. This opinion is not reported in the F.Supp.2d. It is reported at 2006 WL 1129394 (D. Utah).

The opinion of the United States District Court for the District Of Utah, Central Division, Honorable Paul G. Cassell, granting Defendants' Motion for Summary Judgment on all claims. This opinion is not reported in the F.Supp.2d. It is reported at 2006 WL 3422104 (D. Utah).

The decision of the 10th Circuit Court of Appeals, affirming the judgment of the District Court, Honorable Paul G. Cassell. This opinion was not selected for publication in the Federal Reporter. It is reported at 2008 WL 2483286 (C.A.10 (Utah)).

STATEMENT OF JURISDICTION

The Tenth Circuit Court of Appeals filed its opinion on June 19, 2008, affirming the judgment of the United States District Court of Utah, Central Division, Honorable Paul G. Cassell.

Petitioners timely filed a Petition for Rehearing and for En Banc Consideration in the Tenth Circuit. On July 22, 2008, the Tenth Circuit Court of Appeals denied the petition.

This Court has jurisdiction to review the Tenth Circuit Court of Appeals decision on writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 1983
2. U.S. Const., Fourth Amendment

The provisions of the statute and Constitution of the United States are reprinted in the Appendix at pp. A-2 to A-3.

STATEMENT OF THE CASE

The petitioners originally brought their lawsuit in the United States District Court for the District of Utah, Central Division. The basis for jurisdiction was 28 USC § 1331, (federal question), and 28 USC § 1343(a) (deprivation of civil rights). The basis for the jurisdiction of the United States Court of Appeals for the Tenth Circuit was 28 USC § 1291.

Raymond Boyett, the decedent, was arrested on August 27, 2003 because he allegedly failed to appear for a citation in a city court. He did not commit the crime for which he was arrested. The hearing at which he allegedly failed to appear was videotaped, and he clearly appeared on the date and at the time in question, but for whatever reason, the clerk failed to note his appearance on the court's docket. Had his attendance been properly recorded, Boyett would be alive today. Instead, he was arrested, and he was not allowed to post bond. He waited in custody in a facility known officially as "Purgatory," which bore this name upon a sign constructed and maintained by the Respondent Sheriff and his predecessors.

When Boyett entered the gates of Purgatory on August 27, 2003, he did not have any broken bones, he was not bleeding, (internally or externally), he did not have any visible bruises, open wounds, or lacerations on any part of his body, and his blood was free of all dangerous narcotics and anti-psychotics.

On September 6, 2003, Boyett was found dead in his cell. He had five broken ribs, a torn anus and punctured rectum, and his body was covered head to toe with bruises and lacerations. Boyett received each of these injuries, and many more, in Purgatory, while in the custody and care of the Respondents. Boyett was kept in solitary confinement, which means no other Purgatory inmate had access to Boyett, and no inmate could have possibly inflicted any of the injuries Boyett received at, or prior to, his death.

After entering Purgatory, Boyett received an unknown number of injections, (of unknown amounts), of Thorazine, Halidol, and Cogentin. The reason why this information is unknown is because Respondents did not keep track of that information (other than to videotape some, but not all of the injections). These injections, known as, "chemical restraints," were administered by the Respondent Purgatory guards. None of these guards were nurses, doctors, or individuals otherwise qualified to administer injections to humans, or possess the drugs they administered, outside the walls of Purgatory. Nevertheless, in Purgatory, guards are provided with these drugs to use when they believe, in their unqualified and untrained discretion, that administration is appropriate, including whenever an inmate was offensive or combative. One instance of several injections on Boyett was videotaped. The Videotape shows that Boyett was neither offensive, nor combative. Not only was Boyett compliant and non-violent, but he could barely

move or sit without assistance. After Boyett was found dead, Respondents immediately drained his blood and embalmed his body. Respondents did so prior to informing the Petitioners of Boyett's death, and no blood chemistry testing could be done.

If no inmate had access to Boyett, his injuries could only have been inflicted by either the Respondents, or self inflicted by the decedent. Petitioners presented expert testimony that Boyett's injuries were of a nature and extent that they could not have been self inflicted. Petitioner also presented expert testimony that demonstrated, in fact, Boyett had five broken ribs, his anus was torn, (as a result of the violent and forceful insertion of a foreign object), and he was bleeding internally. Because of the photographs of Boyett at the time of his death in the cell in which his body was found, there was no necessity for expert testimony to demonstrate that, more likely than not, Boyett did not self inflict his injuries. It was within the realm of common experience of an ordinary juror that the visible injuries to Boyett alone were of a nature and extent that they could not have been self-inflicted. The existence and nature of the internal injuries further support this reasonable inference.

Since Boyett was dead, he could not identify which of the several Respondents inflicted the harm, nor could he describe the tools used to inflict the injury, or mechanisms by which the injuries were inflicted. As in criminal cases, no one confessed to doing anything, no one saw

anything improper transpire, and no one knew anything, except that Boyett had died. Petitioners inquired of Respondents as to how Boyett died, and Respondents informed them that Boyett fell down some stairs. Boyett's jail cell was like many others, it consisted of one square room, with a bed and a toilet, and had no stairs.

On September 5 at 3:30 p.m., less than 24 hours prior to Boyett's death, Boyett was alive and he had no visible injuries. Within 45 minutes, after being alone with Respondent Kounalis and Redford, a serious open head wound was found on Boyett's skull. All of the respondents agreed that there were no other injuries on Boyett when he went into his observation cell in the late hours of September 5, 2008. On September 6th, at 5:10 a.m., Boyett was found dead, and in the condition described above. Petitioners demonstrated (1) the injuries described above existed; (2) the identity of the Respondents who had access to Boyett before he received the injuries; (3) after being alone with those Respondent's, Boyett was dead; and (4) he did not beat himself to death or insert foreign objects into his body, (and then destroy those objects prior to his death).

Because Boyett was dead, and because no Respondent admitted to either inflicting the harm, or seeing another respondent or third party inflict the harm, Petitioners were without direct evidence in support of their claims of excessive force. The Petitioners relied exclusively on circumstantial evidence. The district court, and the Tenth Circuit, characterized Petitioner's case

as one of *res ipsa loquitor,* which could, at most, demonstrate negligence, and held, as a matter of law, that Petitioner's circumstantial evidence was inadequate to overcome the burden necessary in defense of summary judgment and at trial. Summary Judgment was granted, Petitioner's case dismissed, and the appeal of that decision resulted in an affirmance by the United States Court of Appeals for the Tenth Circuit.

REASONS FOR GRANTING THE WRIT

Petitioner's Petition for Writ should be granted because a United States court of appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Decedent's case raises an issue of exceptional public importance because it addresses the manner of proof required of civil rights plaintiffs alleging excessive force. The Tenth Circuit opinion below took the position that a civil rights plaintiff making an excessive force claim resulting in death could not rely exclusively, or even primarily, on circumstantial evidence to defeat summary judgment. While the Tenth Circuit held that circumstantial evidence could be considered, it affirmed the district court's order granting summary judgment because Petitioners could not identify the perpetrator of decedent's injuries. The circumstances of Petitioner's case will be arise in most all meritorious allegations of excessive force resulting in death to the citizen. The dead citizen cannot testify as to who harmed him and the manner in which the harm was accomplished, and the injury inflicting defendants are not likely to offer any direct testimony against themselves. As a result, as is routinely done in criminal cases, a plaintiff should be allowed to rely exclusively on circumstantial evidence.

Circumstantial evidence has always been considered of the same quality as direct evidence, and, like direct evidence, the weight and persuasive value of circumstantial evidence is left

to the factfinder at trial. The Model Civil Jury Instructions for each Federal Circuit which employs model instructions, specifically provide that there is no distinction in the quality or weight to be given to circumstantial evidence as compared to direct evidence. Ninth Circuit Model Instruction, No. 1.9 (2007 Rev.), 3rd Circuit Model Instruction No. 1.6 (2008 Rev.), 5th Circuit Model Instruction No. 2.18 (1999 Rev.), 7th Circuit Model Instruction No. 1.12 (2005 Rev.), 8th Circuit Model Instruction No. 1/02 (2007 and 2008 proposed), and the 11th Circuit Model Instruction No. 2.1 (2005 Rev.).

The rule is the same in all circuits and states. The court of appeals decision creates a distinction in the quality and weight to be given circumstantial evidence in Excessive Force cases that does not exist in any other type of case, civil or criminal. This holding conflicts with relevant decisions of this Court.

The Tenth Circuit held that Petitioner was held to a higher standard of proof than any other civil or criminal litigant, relying on *Hudson v. McMillan*, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992). The Tenth Circuit held below that *Hudson* requires proof that force was applied to decedent's body "maliciously and sadistically to cause harm." Opinion at Appendix page A-152, *citing Hudson*, 503 U.S. at 7, 112 S.Ct. at 999. While *Hudson*, and its progeny, requires such proof, no holding of this Court has suggested that such proof cannot be met by circumstantial evidence alone. In fact, this Court has held that

exclusive reliance on circumstantial evidence may be sufficient to meet the highest level of proof in our legal system, proof beyond a reasonable doubt. "Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more." *Holland v. United States*, 348 U.S. 121, 138, 75 S.Ct. 127, 99 L.Ed. 150 (1954). This Court has never questioned the propriety of exclusive reliance on circumstantial evidence to support of a criminal conviction. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100, 123 S.Ct 2148, 2154 (2003). Circumstantial evidence has long been accepted as a means of proof in federal civil cases, and, absent some affirmative directive from a statute, this Court has never required a litigant to present some form of direct evidence to prevail on a civil claim. *Desert Palace, Inc.*, 539 U.S. at 100, 123 S.Ct. at 2154. Neither the statute, 42 U.S.C. § 1983, nor the Constitution, nor the relevant amendments thereto, contain any affirmative directives regarding the presentation of direct evidence in support of a claim of excessive force. Petitioners should have been allowed to rely

exclusively on circumstantial evidence to show that the Respondents applied force, maliciously and sadistically, to decedent's body, with the intent to do him harm.

Petitioners presented expert testimony that the injuries were not self inflicted. In addition, it was reasonable, without expert testimony, for a factfinder to infer that the nature and extent of one or more of the injuries were such that they could not have been self inflicted. Last, because no other inmate had access to decedent, and because Petitioners could identify which specific Respondent had private and unsupervised access to Boyett, and the times at which the access was afforded, Petitioner had proven with circumstantial evidence the identity of the perpetrators and the mechanisms of the injury. Decedent had clearly been beaten, and to require Petitioners to identify the object with which he was beaten, and what injuries were inflicted with each blow and/or strike, and by whom, or otherwise produce direct evidence of any element on which they carried the burden of proof, goes beyond the proof requirements of an excessive force claim under 42 U.S.C. § 1983. In light of the facts presented on summary judgment by the Petitioner, a reasonable jury could, "weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference". *Holland*, 348 U.S. at 138.

The Tenth Circuit Opinion, because it requires excessive force claimants to make their proof with direct evidence, is contrary to *Holland*

and *Desert Palace, Inc.*, and is a case that conflicts with relevant decisions of this Court, and all Circuit Court decisions that adhere to the principles of *Holland* and *Desert Palace, Inc.* As such, compelling reasons exist that support the exercise of this Court's discretion to issue a writ of certiorari and consider the question presented.

CONCLUSION

For the foregoing reasons, the respondent respectfully requests that this Honorable Court grant the petition for a writ of certiorari, and reverse the decision of the Tenth Circuit Court of Appeals.

Shandor S. Badaruddin
Counsel of Record
Moriarity, Badaruddin
& Booke, LLC
124 W. Pine Street
Missoula, MT 59802
Tel. (406) 728-6868

No. _____

In The

Supreme Court Of The United States

SANDRA BOYETT, ET AL.,
Petitioners,

v.

WASHINGTON COUNTY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPENDIX

APPENDIX TABLE OF CONTENTS

42 USC §1983..... A-2

U.S. Const., Amendment 4..... A-3

Order granting summary judgment, entered February 13, 2006..... A-4

Order granting summary judgment, entered April 26, 2006..... A-14

Order granting summary judgment, entered November 28, 2006, (not reported in F.Supp.2d), 2006 WL 3422104 (D. Utah)..... A-30

Judgment..... A-125

Opinion of the United States Court of Appeals, Tenth Circuit, dated June 19, 2008, (not selected for publication in the Federal Reporter), 2008 WL 2483286 (C.A.10 (Utah))..... A-126

Order Denying Petition for Rehearing and for En Banc Consideration, dated July 22, 2008, (not reported in any official or unofficial reporter)..... A-164

42 USC §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

U.S. Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States District Court,D. Utah, Central Division.

Sandra BOYETT, individually and as personal representative for the Estate of Raymond Boyett; Jessica (Boyett) Peterson; and Brandy (Boyett) Sorenson, Plaintiffs,

v.

COUNTY OF WASHINGTON, a political subdivision of the State of Utah, et al. Defendants.

No. 2:04-CV-01173 PGC.

Feb. 13, 2006.

Chrisitan Patrick Hur, Shandor S. Badaruddin, Moriarity Gooch Badaruddin & Booke, Missoula, MT, Edward Moriarity, Ryan M. Springer, Moriarity Gooch Badaruddin & Booke, Jeffrey D. Gooch, The Gooch Firm, Salt Lake City, UT, for Plaintiffs.

John D. Luthy, Kevin D. Swenson, Suitter Axland, Salt Lake City, UT, for Defendants.

ORDER GRANTING DEFENDANT RANDY MCKINNON'S MOTION FOR SUMMARY JUDGMENT

CASSELL, J.

*1 In this civil rights case, the surviving family members of Raymond Boyett and his estate seek damages from various government officials and entities. The plaintiffs allege violations of civil

rights under 42 U.S.C. § 1983, negligence, wrongful death, and infliction of emotional distress based on events surrounding Mr. Boyett's death while being held as an inmate at a Washington County, Utah correctional facility.

Defendant Randy McKinnon, a nurse at the jail, has moved for summary judgment on plaintiffs' deliberate indifference claims under § 1983. After carefully considering the parties' arguments, the court GRANTS Mr. McKinnon's motion. A claim that prison officials were deliberately indifferent to an inmate's medical needs will only succeed if the inmate had a serious medical condition that officials were slow to treat, and if the delay in receiving that treatment caused substantial harm. There is no evidence to suggest such indifference in this case.

BACKGROUND

This case arises out of the death of Raymond Boyett on September 6, 2003. Mr. Boyett died while being held as an inmate at the Washington County Purgatory Correctional Facility in Hurricane, Utah. Before Mr. Boyett's incarceration, he underwent surgery for a hernia. After this surgery, Washington County sought and received medical clearance from the Dixie Regional Medical Center to incarcerate Mr. Boyett. He was incarcerated on August 28, 2003.

On August 31, 2003, Mr. Boyett complained to prison authorities that he felt he was bleeding internally. Mr. McKinnon, a nurse at the jail, responded to Mr. Boyett and indicated that he would be fine. The following day, Mr. Boyett was examined by Sabrina Steele, a physician's assistant at the facility. Ms. Steele examined Mr. Boyett's incision from the hernia surgery and concluded that the incision was well healed and that there was no evidence of internal bleeding. Mr. Boyett did not tell Ms. Steele that he felt he was bleeding internally.

On September 3, 2003, Mr. McKinnon again observed Mr. Boyett, who was complaining of being constipated. Mr. McKinnon recommended that Mr. Boyett be allowed to exercise. Mr. McKinnon's shift ended that afternoon, and he did not return to work until after Mr. Boyett died on the morning of September 6, 2003. An autopsy performed by Dr. Edward Lei indicated that Mr. Boyett died of occlusive coronary artery disease with another significant condition being cirrhosis of the liver.

On December 22, 2004, the plaintiffs filed a complaint alleging a variety of state and federal causes of action. The plaintiffs named as defendants Washington County, the Washington County Purgatory Correctional Facility, Washington Country Sheriff Department, and several corrections facility and sheriff department employees in their official and individual capacities.

On March 3, 2005, defendants answered the complaint and later filed their first motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) on March 18, 2005.FN1The court granted the motion in part and denied it in part.FN2The plaintiffs stipulated to dismissal of the first claim against the individually named defendants in their official capacities and of the second claim against the Corrections Facility and the Sheriff's office.FN3 The court denied the motion to dismiss the second claim for relief against Sheriff Kirk Smith in his official capacity.FN4

FN1. Washington County Defs.' Mot. to Dismiss (Docket No. 8).

FN2. Order Granting in Part Washington County Defs.' Mot. to Dismiss (Apr. 12, 2005), Docket No. 15.

FN3.Id.

FN4.Id.

*2 On July 6, 2005, defendants filed their second motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6).FN5 The court granted the motion dismissing the state law causes of action without prejudice.FN6 The defendants then filed a third motion to dismiss pursuant to Rule 12(b)(6) seeking to dismiss the plaintiffs' claims

regarding activities after Mr. Boyett's death.FN7The court construed the motion to dismiss as a motion for judgment on the pleadings and granted the motion.FN8As a result of these prior motions, the only claims left in this suit are the plaintiffs' first and second claims for damages under 42 U.S.C. §§ 1983 and 1988 against Washington County, Washington County Purgatory Corrections Facility, Washington Country Sheriff Department, and the following defendants in their individual capacities: Sheriff Kirk Smith, James Hanson, Destiny Hummer, Fred Keil, Raymond J. Kounalis, Gene Redford, Sabrina Steel, Darryl McCoy, Randy McKinnon, Jon Worlton, and Dave Patt.

FN5. Washington County Defs.' Mot. to Dismiss (Docket No. 19).

FN6. Order Granting Washington County Defs.' Mot. to Dismiss (Aug. 24, 2005), Docket No. 26.

FN7. Washington County Defs.' Mot. to Dismiss (Docket No. 28).

FN8. Order Granting Washington County Defs.' Mot. to Dismiss (Oct. 25, 2005), Docket No. 53.

DISCUSSION

Summary judgment is appropriate if the record shows "there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law."FN9Facts are viewed in the light most favorable to the non-moving party.FN10

FN9.Fed.R.Civ.P. 56(c).

FN10.Sealock v. Colorado, 218 F.3d 1205, 1209 (10th Cir.2000).

Plaintiffs stipulate in their response memorandum that Mr. McKinnon did not inflict the injuries that caused Mr. Boyett's death, but claim that Mr. McKinnon was deliberately indifferent. Plaintiffs claim that Randy McKinnon acted with deliberate indifference to a serious medial need by "fail[ing] to provide medical treatment ... for Mr. Boyett."FN11

FN11. Pls.' Response to Defs.' Mot. for Summ. J. (Docket No. 71), at 4-5, at 10.

Prison officials who show deliberate indifference to an inmate's serious medical needs violate the prohibition against cruel and unusual punishment in the Eighth Amendment.FN12The deliberate indifference inquiry involves both an objective and subjective component.

FN12.Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

The objective component is satisfied when the deprivation is "sufficiently serious." FN13"[A] medical need is sufficiently serious if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention."FN14If there is a sufficiently serious condition and the alleged deliberate indifference stems from a delay in treating that condition, a defendant is liable only if "the delay [in medical care] resulted in substantial harm."FN15

FN13.Farmer v. Brennan, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

FN14.Mata v. Saiz, 427 F.3d 745, 751 (10th Cir.2005) (quoting Sealock v. Colorado, 218 F.3d 1205, 1209 (10th Cir.2000) (further quotation omitted)).

FN15.Oxendine v. Kaplan, 24 F.3d 1272, 1276 (10th Cir.2001).

Even if the objective component is demonstrated, there is no liability unless the subjective component is also satisfied. The subjective component is satisfied when the prison official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."FN16

FN16.Farmer, 511 U.S. at 837.

First, the court considers the objective component. As noted above, the objective component involves determining whether the medical need was "sufficiently serious," whether prison officials were dilatory in responding to the serious medical need, and whether the delay in medical care resulted in substantial harm. Here, plaintiffs have introduced evidence that Mr. Boyett was internally bleeding, which constitutes a serious medical need. Plaintiffs, however, have not produced facts showing that Mr. McKinnon delayed treating this condition or that a delay resulted in substantial harm.

*3 There is no evidence that Mr. McKinnon delayed in treating Mr. Boyett. Mr. Boyett complained of internal bleeding on August 31, 2003, and Mr. McKinnon saw him that same day.FN17The day after Mr. McKinnon saw him, Mr. Boyett was examined by a physician's assistant, Sabrina Steele; she also did not find any evidence of internal bleeding, and Mr. Boyett did not complain that he felt he was bleeding internally.FN18

FN17. Pls.' Response to Def.'s Mot. for Summ. Judg. (Docket No. 71), Ex. 8.

FN18. Depo. of Sabrina Steele, Ex. A of Def.'s Reply Brief, at 107-09.

Finally, no evidence suggests that the internal bleeding caused Mr. Boyett substantial harm. The cause of Mr. Boyett's death on September 6, 2003, was determined in an autopsy to be occlusive coronary artery disease.FN19Plaintiffs do not argue or produce evidence that internal bleeding contributed to the coronary artery disease or otherwise caused any substantial harm to Mr. Boyett.FN20And even more important, the plaintiffs conceded that Mr. McKinnon was not responsible for Mr. Boyett's injuries or death. While deposing Mr. McKinnon, plaintiffs' attorney said, "I want to say that the plaintiffs do not feel that you ... had anything to do with Mr. Boyett's physical injuries."FN21

FN19. Depo. of Edward Leis. 7:17-19, Ex. G of Def.'s Mem. in Supp. of Mot. for Summ. J. (Docket No. 66).

FN20. Pls.' Response to Def.'s Mot. for Summ. J. (Docket No. 71), at 10-13.

FN21. Depo. of Randy McKinnon. 66:20-22, Ex. H of Def.'s Mem. in Supp. of Mot. for Summ. J. (Docket No. 66).

Based on these undisputed facts, plaintiffs have not satisfied the objective component of the deliberate indifference inquiry. There is no evidence that there was a delay by Mr. McKinnon that caused substantial harm to Mr. Boyett. More

important, plaintiffs admit that Mr. McKinnon was not responsible for Mr. Boyett's injuries that resulted in his death. Thus, the court need not reach the subjective component of the deliberate indifference inquiry. Therefore, Mr. McKinnon is entitled to judgment as a matter of law.

CONCLUSION

Defendant Randy McKinnon's motion for summary judgment [# 66] is GRANTED. All plaintiffs' § 1983 claims against Defendant Randy McKinnon are dismissed with prejudice.

DATED this 10th day of February, 2006.

BY THE COURT:

/s/ Paul G. Cassell
Paul G. Cassell
United States District Judge

United States District Court, D. Utah, Central Division.

Sandra BOYETT, individually, and as personal representative for the Estate of Raymond Boyett; Jessica (Boyett) Peterson; and Brandy (Boyett) Sorensen, Plaintiffs,

v.

COUNTY OF WASHINGTON, a political subdivision of the State of Utah, et al., Defendants.

No. 2:04CV01173PGC-DON.

April 26, 2006.

Chrisitan Patrick Hur, Shandor S. Badaruddin, Moriarity Gooch Badaruddin & Booke, Missoula, MT, Edward Moriarity, Ryan M. Springer, Moriarity Badaruddin & Booke, Jeffrey D. Gooch, The Gooch Firm, Salt Lake City, UT, for Plaintiffs.

John D. Luthy, Kevin D. Swenson, Suitter Axland, Salt Lake City, UT, for Defendants.

ORDER GRANTING DEFNDANTS FRED KEIL'S AND JON WORLTON'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFFS' MOTION TO WITHDRAW THEIR MOTION FOR SUMMARY JUDGMENT

CASSELL, J.

*1 In this civil rights case, the surviving family members of Raymond Boyett and his estate seek damages from various government officials and entities. The plaintiffs seek damages for alleged violations of civil rights under 42 U.S.C. § 1983, negligence, wrongful death, and infliction of emotional distress based on events surrounding Mr. Boyett's death while being held as an inmate at a Washington County, Utah correctional facility.

Defendants Fred Keil and Jon Worlton have moved for summary judgment on plaintiffs' deliberate indifference, excessive force, and unwanted administration of antipsychotics claims under § 1983. In addition, plaintiffs have moved to withdraw their motion for summary judgment against all defendants. After carefully considering the parties' arguments, the court GRANTS Mr. Keil's and Mr. Worlton's motions. A claim that prison officials were deliberately indifferent to an inmate's medical needs will succeed only if the inmate had a serious medical condition that officials were slow to treat, and if the delay in receiving that treatment caused substantial harm. There is no evidence to suggest such indifference in this case by Mr. Keil or Mr. Worlton. A claim of excessive force by prison officials will succeed only if the force was not applied in good faith to maintain discipline, but maliciously or sadistically to cause the prisoner harm. There is no evidence to suggest that these defendants applied any force to Mr. Boyett. A claim of involuntary

administration of antipsychotic drugs will succeed only if the individual's liberty interest outweighs the state interest in preventing the individual from harming himself or others at the institution. There is no evidence to suggest that the medications were not in Mr. Boyett's medical interest to prevent him from harming himself. The court also GRANTS plaintiffs' motion to withdraw their motion for summary judgment.

BACKGROUND

Mr. Boyett died while being held as an inmate at the Washington County Purgatory Correctional Facility in Hurricane, Utah. Before Mr. Boyett's incarceration, he underwent surgery for a hernia. After this surgery, Washington County sought and received medical clearance from the Dixie Regional Medical Center to incarcerate Mr. Boyett. He was incarcerated on August 28, 2003.

On September 3, 2003, Mr. Boyett fell near some stairs, and another prisoner notified Fred Keil, a deputy at the facility, of the fall. Mr. Keil radioed Nurse Darryl McCoy and waited with Mr. Boyett until Mr. McCoy arrived. Mr. McCoy examined Mr. Boyett and treated him for a cut on the arm.

On September 5, 2003, Jon Worlton, a social worker at the facility, examined Mr. Boyett's mental condition at the request of the medical staff. The day before, Mr. Boyett banged his head on a door through much of the swing shift. After

the examination, Mr. Worlton concluded that Mr. Boyett was suffering from some psychosis and may be a danger to himself. Mr. Worlton referred Mr. Boyett to the medical staff for evaluation and possible treatment with anti-psychotic medications. Mr. Worlton was part of the three-person team that determined that Mr. Boyett was a danger to himself and that antipsychotic drugs should be administered to him for his own protection.

*2 Mr. Boyett died on September 6, 2003. Mr. Keil was not on duty the day Boyett died. Mr. Worlton did not have any contact with Mr. Boyett on September 6; his interaction with Boyett was limited to two meetings on September 5, the day before Boyett's death.

On December 22, 2004, the plaintiffs filed a complaint alleging a variety of state and federal causes of action. The plaintiffs named as defendants Washington County, the Washington County Purgatory Correctional Facility, Washington Country Sheriff Department, and several corrections facility and sheriff department employees in their official and individual capacities.

On March 3, 2005, the defendants answered the complaint and later filed their first motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) on March 18, 2005.FN1The court granted the motion in part and denied it in

part.FN2The plaintiffs stipulated to dismissal of the first claim against the individually named defendants in their official capacities and of the second claim against the Corrections Facility and the Sheriff's office.FN3 The court denied the motion to dismiss the second claim for relief against Sheriff Kirk Smith in his official capacity.FN4

FN1. Washington County Defs.' Mot. to Dismiss (Docket No. 8).

FN2. Order Granting in Part Washington County Defs.' Mot. to Dismiss (Apr. 12, 2005), Docket No. 15.

FN3.Id.

FN4.Id.

On July 6, 2005, the defendants filed their second motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6).FN5 The court granted the motion dismissing the state law causes of action without prejudice.FN6 The defendants then filed a third motion to dismiss pursuant to Rule 12(b)(6) seeking to dismiss the plaintiffs' claims regarding activities after Mr. Boyett's death.FN7The court construed the motion to dismiss as a motion for judgment on the pleadings and granted the motion.FN8On December 11, 2005, Defendant Randy McKinnon filed a motion for summary judgment, which the court granted.

FN5. Washington County Defs.' Mot. to Dismiss (Docket No. 19).

FN6. Order Granting Washington County Defs.' Mot. to Dismiss (Aug. 24, 2005), Docket No. 26.

FN7. Washington County Defs.' Mot. to Dismiss (Docket No. 28).

FN8. Order Granting Washington County Defs.' Mot. to Dismiss (Oct. 25, 2005), Docket No. 53.

As a result of these prior motions, the only claims left in this suit are the plaintiffs' first and second claims for damages under 42 U.S.C. §§ 1983 and 1988 against Washington County, Washington County Purgatory Corrections Facility, Washington Country Sheriff Department, and the following defendants in their individual capacities: Sheriff Kirk Smith, James Hanson, Destiny Hummer, Fred Keil, Raymond J. Kounalis, Gene Redford, Sabrina Steel, Darryl McCoy, Jon Worlton, and Dave Patt.

DISCUSSION

Summary judgment is appropriate if the record shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."FN9Facts are

viewed in the light most favorable to the non-moving party.FN10

FN9.Fed.R.Civ.P. 56(c).

FN10.Sealock v. Colorado, 218 F.3d 1205, 1209 (10th Cir.2000).

Plaintiffs allege various constitutional violations against Mr. Keil and Mr. Worlton. Against Mr. Keil, plaintiffs allege deliberate indifference to Mr. Boyett's serious medical needs and use of excessive force. Against Mr. Worlton, plaintiffs allege deliberate indifference to Mr. Boyett's serious medical needs and involuntary administration of antipsychotic drugs.

*3 In response to these allegations, defendants invoked the defense of qualified immunity in their answer. As a result of defendants invoking the defense of qualified immunity, plaintiffs must demonstrate that defendants violated a specific constitutional right and that this right was "clearly established" at the time of defendant's actions.FN11Because there is no evidence presented to the court that defendants violated Mr. Boyett's constitutional rights, the court need not reach the question of whether these rights were clearly established.

FN11.Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

I. Deliberate Indifference Claims

A prison official who shows deliberate indifference to an inmate's serious medical needs violates the prohibition against cruel and unusual punishment in the Eighth Amendment.FN12The deliberate indifference inquiry involves both an objective and subjective component. The objective component is satisfied when the deprivation is "sufficiently serious." FN13"[A] medical need is sufficiently serious if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention."FN14If there is a sufficiently serious condition and the alleged deliberate indifference stems from a delay in treating that condition, a defendant is liable only if "the delay [in medical care] resulted in substantial harm."FN15However, a plaintiff's difference of opinion with the medical judgment of medical staff does not state a constitutional violation.FN16Even negligence by a treating physician that rises to the level of medical malpractice does not violate the Eighth Amendment.FN17

FN12.Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

FN13.Farmer v. Brennan, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

FN14.Mata v. Saiz, 427 F.3d 745, 751 (10th Cir.2005) (quoting Sealock v. Colorado, 218 F.3d 1205, 1209 (10th Cir.2000) (further quotation omitted)).

FN15.Oxendine v. Kaplan, 24 F.3d 1272, 1276 (10th Cir.2001).

FN16.Perkins v. Kansas Dept. of Corrections, 165 F.3d 803, 811 (10th Cir.1999).

FN17.Id.

Even if the objective component is demonstrated, there is no liability unless the subjective component is also satisfied. The subjective component is satisfied when the prison official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."FN18

FN18.Farmer, 511 U.S. at 837.

A. Defendant Fred Keil

Mr. Keil's actions do not demonstrate deliberate indifference to Mr. Boyett's medical needs. Under the objective component of the inquiry, there is no evidence that Mr. Keil delayed medical treatment of Mr. Boyett. On September 3, 2003, another

prisoner notified Mr. Keil that Mr. Boyett was dizzy and fell.FN19 Mr. Keil radioed Nurse Darryl McCoy and waited by Mr. Boyett until Mr. McCoy arrived. Mr. McCoy examine Mr. Boyett and treated him for a cut on the arm.FN20

FN19. Depo. of Fred Keil, 6:12-18, Ex. 1 of Def.'s Mem. in Supp. of Mot. for Summ. J. (Docket No. 77).

FN20.Id.; Jail Log Entry of Darryl McCoy, Sept. 3, 2003, Ex. 3 of Def.'s Mem. in Supp. of Mot. for Summ. J. (Docket No. 77).

There is also no evidence that any delay by Mr. Keil caused Mr. Boyett substantial harm. Nurse McCoy's report of his examination of Mr. Boyett on this day does not indicate that Mr. Boyett had received any injuries except for a cut to the arm.FN21In addition, Plaintiffs have failed to produce any evidence that a delay by Mr. Keil caused Mr. Boyett any harm. Based on these undisputed facts, plaintiffs have not satisfied the objective component of the deliberate indifference inquiry. Thus, the court need not reach the subjective component of the deliberate indifference inquiry.

FN21. Jail Log Entry of Darryl McCoy, Sept. 3, 2003, Ex. 3 of Def.'s Mem. in Supp. of Mot. for Summ. J. (Docket No. 77).

B. Defendant Jon Worlton

*4 Mr. Worlton's actions do not demonstrate deliberate indifference to Mr. Boyett's medical needs. On September 5, 2003, Mr. Worlton interviewed Mr. Boyett at the request of the facility's medical staff.FN22Mr. Worlton concluded that Mr. Boyett was suffering from some psychosis and may be a danger to himself.FN23Mr. Worlton referred Mr. Boyett for evaluation and treatment with anti-psychotic medications.FN24Since Mr. Worlton examined Mr. Boyett and referred him to the medical staff for further evaluation and treatment, Mr. Worlton did not learn of and then "disregard[ ] an excessive risk to [Mr. Boyett's] health or safety.FN25Even if Mr. Worlton was negligent in evaluating Mr. Boyett, this fact would not suggest an Eighth Amendment violation.FN26Therefore, there is no evidence before the court to support the subjective prong of the deliberate indifference test, and the court need not reach the objective prong of the test.

FN22. Mental Health Progress Note, Sept.3, 2003, Ex. B of Def.'s Mem. in Supp. of Mot. for Summ. J. (Docket No. 82).

FN23. Depo. of Fred Keil, 30:1-5, Ex. A of Def.'s Mem. in Supp. of Mot. for Summ. J. (Docket No. 82).

FN24. Mental Health Progress Note, Sept.3, 2003, Ex. B of Def.'s Mem. in Supp. of Mot. for Summ. J. (Docket No. 82).

FN25.See Farmer, 511 U.S. at 837.

FN26.Perkins, 165 F.3d at 811.

II. Excessive Use of Force

There is no evidence that Mr. Keil used excessive physical force against Mr. Boyett. Although Plaintiffs' characterize their assault claim as an unreasonable seizure under the Fourth Amendment,FN27 this claim is clearly one alleging an excessive use of physical force by prison officials under the Eighth Amendment.FN28Whether a prison official's conduct violates the Eighth Amendment turns on whether the force was applied "in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."FN29

FN27.See Pls.' Mot. for Summ. J. and Response to Def.'s Mot. for Summ. J. (Docket No. 79), at 8-10.

FN28.Hudson v. McMillian, 503 U.S. 1, 6-7, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992).

FN29.DeSpain v. Uphoff, 264 F.3d 965, 978 (10th Cir.2001) (quoting Whitley v. Albers, 475 U.S.

312, 320-21, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986)).

As noted above, there is no evidence that on September 3, 2003, Mr. Keil used any physical force against Mr. Boyett or that Mr. Boyett suffered any harm other than a cut to the arm resulting from his fall.FN30In addition, it is undisputed that Mr Keil was not on duty three days later when Mr. Boyett died.FN31As there is no evidence that Mr. Keil assaulted Mr. Boyett or that he was deliberately indifferent to Mr. Boyett's medical needs, Mr. Keil is entitled to qualified immunity against Plaintiffs' § 1983 claims.

FN30.Id.

FN31. Depo. of Fred Keil, 12:6-8, Ex. 1 of Def.'s Mem. in Supp. of Mot. for Summ. J. (Docket No. 77).

III. Involuntary Administration of Antipsychotic Drugs

Mr. Worlton did not violate Mr. Boyett's liberty interest against involuntary administration of antipsychotic drugs. "It is well established that an individual has a liberty interest in 'avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." ' FN32 Court should balance the individual liberties of the inmate against "the

interests of the institution in preventing the individual from harming himself or others residing or working in the institution." FN33The State may treat a mentally-ill patient against his will "if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." FN34

FN32.Jurasek v. Utah State Hospital, 158 F.3d 506, 510 (10th Cir.1998) (quoting Washington v. Harper, 494 U.S. 210, 221-22, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990)).

FN33.Id.

FN34.Washington v. Harper, 494 U.S. 210, 227, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990).

On September 5, 2003, Mr. Worlton interviewed Mr. Boyett and concluded that Mr. Boyett could be mentally ill.FN35Mr. Worlton was part of the three-person team that determined that Mr. Boyett was a danger to himself and that he should be administered antipsychotic drugs to protect himself.FN36Construing the record in light most favorable to the plaintiffs, Mr. Boyett was exerting bizzare behavior the week before his death. For example, Mr. Boyett was confused and disoriented during the interview with Mr. Worlton, made strange requests to the prison officials,FN37 and banged his head on a door through much of the swing shift the day before.FN38Mr. Boyett did not object to receiving

the antipsychotic medication, so the medication was not administered against his will.FN39Since Mr. Boyett was determined to be mentally ill and a danger to himself, Mr. Worlton did not infringe Mr. Boyett's liberty interest by participating in the decision to administer the antipsychotic medication to Mr. Boyett.

FN35. Mental Health Progress Note, Sept.3, 2003, Ex. B of Def.'s Mem. in Supp. of Mot. for Summ. J. (Docket No. 82).

FN36. Depo. of Jon Worlton, 24:21-23, 28:13-17, Ex. 7 of Pla.'s Mem. in Response to Def.'s Mot. for Summ. J. (Docket No. 104).

FN37. Mental Health Progress Note, Sept.3, 2003, Ex. B of Def.'s Mem. in Supp. of Mot. for Summ. J. (Docket No. 82).

FN38. Jail Log Entry of James Hanson, Sept. 4, 2003, Ex. M of Pla.'s Mem. in Response to Def.'s Mot. for Summ. J.(Docket No. 104), at BOY 0542.

FN39. Depo. of James Hanson, 83:21-25 to 84:1-8, Ex. 4 of Pla.'s Mem. in Response to Def.'s Mot. for Summ. J. (Docket No. 104).

IV. Expert Report

*5 During the March 30, 2006, hearing on these motions, some question arose as to whether

information provided in forthcoming expert report would suggest that summary judgment should be denied. Since the hearing, the report of plaintiffs' expert Roger Clark was filed on March 31, 2006. The court has reviewed that report and finds that it addresses largely unrelated subjects. Therefore, it does not create a genuine issue of material fact regarding these two defendants' liability. Thus, summary judgment is still appropriate for defendants Keil and Worlton.

V. Motion to Strike

Finally, defendants filed a motion to strike certain reports that plaintiffs submitted in support of their motion for summary judgment. Since plaintiffs have voluntarily withdrawn their summary judgment motion, the motion to strike is DENIED AS MOOT.

CONCLUSION

Defendants Fred Keil's and Jon Worlton's motions for summary judgment [# 76, 81] are GRANTED. All plaintiffs' § 1983 claims against Defendants Fred Keil and Jon Worlton are dismissed with prejudice. Plaintiffs' motion to withdraw their motion for summary judgment against all defendants [# 115] is GRANTED; docket # 78 is therefore withdrawn. Defendants' motion to strike [# 99] is DENIED AS MOOT.

SO ORDERED.

DATED this 26th day of April, 2006.

BY THE COURT:
/s/ Paul G. Cassell
Paul G. Cassell
United States District Judge

United States District Court, D. Utah,Central Division.

Sandra BOYETT, individually, and as personal representative for the Estate of Raymond Boyett; Jessica (Boyett) Peterson; and Brandy (Boyett) Sorenson, Plaintiffs,

v.

COUNTY OF WASHINGTON, a political subdivision of the State of Utah; Washington Count Purgatory Correctional Facility, a political subdivision of the State of Utah; Washington County Sheriff Department; a political subdivision of the State of Utah; Kirk Smith, Sheriff of Washington County, individually and officially; Destiny Hummer; individually and officially; Fred Keil; individually and officially; Raymond J. Kounalis, individually and officially; Gene Redford, individually and officially; Sabrina Steele, individually and officially, Darryl McCoy, individually and officially, Randy McKinnon, individually and officially; Dave Patt, individually and officially; and Does 1-10, Defendants.

No. 2:04cv1173.

Nov. 28, 2006.

Bradley L. Booke, Edward Moriarity, Ryan M. Springer, Moriarity Badaruddin & Booke, Salt Lake City, UT, Christian Patrick Hur, Shandor S. Badaruddin, Moriarity Gooch Badaruddin & Booke, Missoula, MT, for Plaintiffs.

J. Michael Hansen, Kevin D. Swenson, Suitter Axland, Salt Lake City, UT, Michele Mitchell, Washington County Attorneys Office, St. George, UT, John D. Luthy, Camden, SC, for Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

PAUL G. CASSELL, District Judge.

*1 This civil rights case arises out of the tragic death of Raymond Boyett. Mr. Boyett died while being held as an inmate at a Washington County, Utah, correctional facility. His estate now seeks damages from various government officials and entities for alleged violations of Mr. Boyett's civil rights under 42 U.S.C. § 1983, and theories of negligence, wrongful death, and infliction of emotional distress. The plaintiff estate's principal claim is that Mr. Boyett's jailers failed to provide adequate medical care to him, used excessive force, and maintained defective policies, which resulted in a violation of his constitutional rights.

All of the remaining defendants have moved for summary judgment on the plaintiff's claims. After

carefully considering the parties' arguments, the court GRANTS the defendants' motions for summary judgment on all claims against all defendants. In short, the plaintiff has failed to defeat the individual defendants' claims of qualified immunity by establishing any defendant violated a constitutional right of Mr. Boyett that was clearly established. No evidence supporting a claim of inadequate training or supervision establishes the claim against Sheriff Smith. And, with regard to Washington County, the plaintiff has failed to meet the "rigorous standard[ ]" FN1 required for a claim of municipal liability under § 1983 to succeed.

FN1.Board of County Comm'rs v. Brown, 520 U.S. 397, 405 (1997).

BACKGROUND

I. Factual Background

When considering a motion for summary judgment, the court views the evidence in the light most favorable to the nonmoving party.FN2Viewed in this light, the record reflects the following facts.

FN2.See Cortez v. McCauley, 438 F.3d 980, 988 (10th Cir.2006).

On August 20, 2003, Officer Brent Nelson arrested Mr. Boyett for driving under the influence, driving without insurance, driving on a suspended license, and failing to register his vehicle. Mr. Boyett had other, similar charges already pending against him from a June 2, 2003, incident. Before incarcerating Mr. Boyett, Washington County sought and received medical clearance from Dr. Michael Tremea at the Dixie Regional Medical Center. In the Prisoner Medical Clearance Report, Dr. Tremea listed alcohol intoxication and recent abdominal surgery under "Diagnosis" and recommended Mr. Boyett continue his regular dose of Methadone. Mr. Boyett was released from custody on August 21, 2003. Shortly thereafter, Judge James L. Shumate and Judge Eric Ludlow each issued arrest warrants for Mr. Boyett based on the two criminal incidents. Deputy Laura Stokes arrested Mr. Boyett pursuant to these arrest warrants, on August 27, 2003. Correctional booking staff members already had notations on file of some of Mr. Boyett's medical history. Upon being booked, jail officials reviewed Mr. Boyett's medical history with him. Mr. Boyett stated nothing in his medical history had changed.

On Sunday, August 31, 2003, Mr. Boyett indicated he thought he was bleeding inside due to surgery for a hernia about one month prior. He complained again about three hours later. James Hanson and Randy McKinnon, licensed practical nurses, responded, evaluated Mr. Boyett, and recorded his complaints, including his complaint

that he had spit up blood. During routine medical rounds, medical staff again checked on Mr. Boyett that evening.

*2 A Physician's Assistant, Sabrina Steele, evaluated Mr. Boyett on September 1, 2003. PA Steele works under the supervision of Dr. Bruce Burnham, a physician at the correctional facility in Gunnison, Utah. PA Steele had no discussions with Dr. Burnham about Mr. Boyett, but Dr. Burnham was available to consult with PA Steele twenty-four hours a day. During her evaluation of Mr. Boyett, PA Steele requested he advise her of his medical history. Among other things, Mr. Boyett indicated he suffered from alcohol withdrawal symptoms and he was concerned about healing from his hernia surgery. PA Steele prescribed 500 mg of Naprosyn twice daily and 25 mg of Elavil twice daily for Mr. Boyett's neck and back pain. She prescribed 0.1 mg of Clonidine twice daily to treat his Methadone withdrawal. She ordered liver function tests to be performed on Mr. Boyett and requested followup as needed. PA Steele advised the medical staff to contact her if they had questions about any of the inmates, including Mr. Boyett.

At 10:38 a.m. on September 2, 2003, jail medical staff saw Mr. Boyett during "inmate sick call." At 10:26 p.m., medical staff administered prescribed medications to Mr. Boyett. At 11:30 p.m., Mr. Boyett requested to see medical staff again, complaining his liver was bad. Medical staff was notified, but responded by telling jail officials Mr.

Boyett had already been seen and had received his medications. On September 3, 2003, at about 2:00 a.m., Mr. Boyett complained to jail staff that he suffered from Hepatitis C and his doctor told him he could die at any time. He also said he had not slept in five days, and he requested to be hooked up to I.V.s. The officer spoke with his commanding officer, and was told Mr. Boyett would have to wait until the morning to speak with the medical staff when they came on duty.

The record shows that during phone calls, Mr. Boyett talked in some detail to his family about various complaints such as falling several times, coughing, and his ears plugging up, but the complaints he relayed to the jail staff were far more sparse. Mr. Boyett's sister, Judy Brady, sent a letter to the Washington County Attorney's Office, voicing her concern Mr. Boyett may be receiving inappropriate medical care. Chief of Police Lambert forwarded Ms. Brady's letter to the correctional facility. In an e-mail to Chief Lambert on September 3, 2003, Nurse Darryl McCoy outlined the medical care of Mr. Boyett to that point. The e-mail explained Mr. Boyett had been given medication, attended to by PA Steele, and given numerous opportunities to see medical staff.

On September 3, 2003, Mr. Boyett fell near some stairs, and another prisoner notified Fred Keil, a deputy at the facility, of the fall. Deputy Keil radioed Nurse McCoy and waited with Mr. Boyett until Nurse McCoy arrived. Nurse McCoy

examined Mr. Boyett, treated him for a cut on the arm, and placed him under medical observation for the dizziness he claimed caused his fall. He also requested the staff on the next medical rounds to assess Mr. Boyett's injury. On September 3, 2006, at about midnight, Mr. Boyett told an officer he fell again. The medical technician who responded to evaluate him noted Mr. Boyett described falling, but then denied he had fallen.

*3 On September 4, 2003, Mr. Boyett submitted an inmate request form saying: "I need a request to have my mother's liver transplanted into me and then bury my mother here in LaVerkin, UT."FN3

FN3. Washington County Purgatory Correctional Facility Inmate Request Form, Docket No. 104, Exh. 3.

On September 4, 2003, Mr. Boyett banged his head on a door throughout much of the swing shift (3:00 p.m. to 11:00 p.m.). Considering this to be dangerous behavior, Nurse Hanson administered 100 mg of Thorazine to Mr. Boyett and ordered Mr. Boyett to be placed in observation. Thorazine is an antipsychotic. It is disputed as to whether PA Steele prescribed the Thorazine by telephone, but this dispute is immaterial because PA Steele indicated she agreed with the administration of Thorazine to Mr. Boyett and the jail staff

administered it consistent with a physician's standing orders.

Further, on September 5, 2003, Jon Worlton, a licensed clinical social worker at the jail, examined Mr. Boyett's mental condition at the request of medical staff. After the examination, Mr. Worlton concluded Mr. Boyett was suffering from some psychosis. A three-person team, including Mr. Worlton, ultimately determined Mr. Boyett posed a danger to himself, and antipsychotic drugs should be administered to him for his own protection. Mr. Worlton referred Mr. Boyett to the medical staff for evaluation and possible treatment.

On September 5, 2003, at about 4:49 p.m., Deputy Ray Kounalis noticed a bloody spot on the back of Mr. Boyett's head. Corporal Eugene Redford and Deputy Kounalis accompanied Mr. Boyett to the infirmary to have his injury treated by Nurse Hanson. Mr. Boyett'shead injury was the only medical condition requiring treatment of which Deputies Redford and Kounalis were aware. Other than assisting Mr. Boyett in reaching the nursing station, Corporal Redford and Deputy Kounalis had no contact with Mr. Boyett during his period of incarceration. Nurse Hanson cleaned and treated Mr. Boyett'shead injury, reporting that it needed no sutures. Around this same time, Nurse Hanson made a note Mr. Boyett had been given 100 mg of Thorazine. At 7:45 p.m., Nurse Destiny Hummer injected Mr. Boyett with another 100 mg

of Thorazine, with his permission, to help calm him down.

Nurse Hummer checked Mr. Boyett at 12:38 a.m. on September 6, 2003. Jail records show other staff members observed him at 1:30 a.m., 2:30 a.m., 3:00 a.m., and 4:00 a.m. At about 5:10 a.m., Mr. Boyett was found to be dead. The next day, on September 7, 2003, Dr. Edward Leis, a Deputy Chief Medical Examiner for the State of Utah, conducted an autopsy on the body of Mr. Boyett. Dr. Leis determined the most significant findings were Mr. Boyett's occlusive coronary artery disease, cirrhosis of the liver secondary to a Hepatitis C infection, and alcohol abuse. In his autopsy report, Dr. Leis noted "Toxicological testing identified no elevated levels of any medication."FN4After Mr. Boyett's body had been embalmed, his family hired another doctor to perform an autopsy. Dr. John Wallace Graham completed an autopsy on September 9, 2003. In his autopsy report, Dr. Graham did not offer any opinions or conclusions relating to the cause or manner of Mr. Boyett's death.

FN4. Office of the Medical Examiner; Report of Examination, signed by Edward A. Leis (Feb. 5, 2004), Docket No. 104, Exh. 9.

*4 At the time of Mr. Boyett's death, Kirk Smith held the position of Washington County Sheriff. Sheriff Smith was in charge of the correctional facility by virtue of his position, but he had no

involvement with Mr. Boyett or his care or custody. After Mr. Boyett died, Sheriff Smith ordered an investigation into his death. From the evidence to which the parties cited, it is not clear what, if anything, this investigation revealed about the cause or manner of Mr. Boyett's death.

II. Procedural Background

On December 22, 2004, the plaintiffs filed a complaint alleging a variety of state and federal causes of action. The plaintiffs named as defendants Washington County, the Washington County Sheriff's Office, and several corrections facility and sheriff department employees in their official and individual capacities.

On March 3, 2005, the defendants answered the plaintiff's complaint and, on March 18, 2005, filed their first motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6).FN5 The court granted the motion in part and denied it in part.FN6The plaintiff stipulated to dismissal of the first claim against the individually named defendants in their official capacities and of the second claim against the correctional facility and the sheriff's office.FN7The court denied the motion to dismiss the second claim for relief against Sheriff Kirk Smith in his official capacity.FN8

FN5.See Washington County Defs.' Mot. to Dismiss, Docket No. 8.

FN6.See Order Granting in Part Washington County Defs.' Mot. to Dismiss, Docket No. 15 (Apr. 12, 2005).

FN7.Id.

FN8.Id.

On July 6, 2005, the defendants filed their second motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6).FN9 The court granted the motion, dismissing the state law causes of action without prejudice.FN10 The defendants then filed a third motion to dismiss pursuant to Rule 12(b)(6), seeking to dismiss the plaintiffs' claims regarding activities after Mr. Boyett's death.FN11The court construed the motion to dismiss as a motion for judgment on the pleadings and granted the motion.FN12Because the court dismissed these common law and civil rights claims of Plaintiffs Sandra Boyett, Jessica (Boyett) Peterson, and Brandy (Boyett) Sorenson, the Estate of Raymond Boyett stands as sole remaining plaintiff. On December 11, 2005, Defendant Randy McKinnon filed a motion for summary judgment, which the court granted.FN13On December 30, 2005, Defendant Fred Keil filed a motion for summary judgment FN14 and on January 11, 2006, Defendant Jon Worlton filed a motion for summary judgment.FN15The court granted both motions .FN16

FN9.See Washington County Defs.' Mot. to Dismiss, Docket No. 19.

FN10.See Order Granting Washington County Defs.' Mot. to Dismiss, Docket No. 26 (Aug. 24, 2005).

FN11.See Washington County Defs.' Mot. to Dismiss, Docket No. 28.

FN12.See Order Granting Washington County Defs.' Mot. to Dismiss, Docket No. 53 (Oct. 25, 2005).

FN13.See Washington County Defs.' Mot. for Summ. J., Docket No. 66; Order Granting Washington County Defs.' Mot. for Summ. J., Docket No. 98 (Feb. 2, 2006).

FN14.See Washington County Defs.' Mot. for Summ. J., Docket No. 76.

FN15.See Washington County Defs.' Mot. for Summ. J., Docket No. 81.

FN16.See Order Granting Washington County Defs.' Mots. for Summ. J., Docket No. 120 (Apr. 26, 2006).

As a result of these prior motions, the only claims left in this suit are the Estate of Raymond

Boyettt's first and second claims for damages under 42 U.S.C. §§ 1983 and 1988 against Washington County, and the following defendants in their individual capacities: Sheriff Kirk Smith, James Hanson, Destiny Hummer, Raymond J. Kounalis, Gene Redford, Sabrina Steele, Darryl McCoy, and Dave Patt. In this order, the court addresses these defendants' summary judgment motions and various other pending motions. The court held a hearing on the summary judgment motions on September 28, 2006.

DISCUSSION

*5 The court first considers the parties' Daubert motions, then the plaintiff's general allegations that Mr. Boyett suffered a physical attack. Next, the court addresses the plaintiff's claims of excessive force against individual defendants, followed by the claims of failure to provide adequate medical care, then the claims against Sheriff Kirk Smith and Washington County. Finally, the court rules on the plaintiff's Motion to Correct Mistake.

I. Daubert Motions and Motions in Limine

In this case, the plaintiff has lodged extremely serious allegations against the defendants. In particular, the plaintiff alleges that correctional staff raped, beat, and "murdered" Mr. Boyett.FN17These charges must be examined carefully. On careful examination, however, the

support for these charges is utterly non-existent. Indeed, perhaps heedful of this, the plaintiff spends much of its time arguing the inconsistent theory that Mr. Boyett's death was caused by the provision of inadequate medical care. The only real support for the rape and murder allegations appears in second-hand, "expert" reports that are not proper evidence. Recognizing this, the defendants have filed Daubert and Rule 26 challenges to all of the plaintiff's expert witness. The plaintiff, in kind, has challenged the defendants' expert witnesses. The court finds these challenges to be valid with regard to Dr. William Keith Lara, Dr. Eugene Strayhorn, Dr. Frederick Lovell, Dr. J. Wallace Graham, and Joseph Kasperick, and strikes these experts' reports and testimony.

FN17.See, e.g., Pls.' Mem. in Opp'n to Medical Defs.' Mot. for Summ. J., Docket No. 147, at xlvl, lvi,1.

It is the job of the trial judge to ensure that any scientific evidence or testimony is both relevant and reliable, before it is admitted into evidence.FN18 This same gate-keeping function applies to testimony and evidence based on "technical" and "other specialized" knowledge as well.FN19Based on Daubert, Rule 702 provides general standards for trial courts to use in assessing the reliability and helpfulness of expert testimony:

FN18.Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993).

FN19.Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999).

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.FN20

FN20.Fed.R.Evid. 702.

In other words, experts must identify the facts and data forming the basis for their testimony so courts can assess the sufficiency of the facts and data. And to be admissible, experts must base their opinions on scientific methods and procedures, not mere subjective belief or unsupported speculation. In particular, "[w]hen dealing with an issue of medical causation, a considered medical judgment is necessary, expressed in terms of probability rather than possibility."FN21The court may exclude evidence where it finds "an impermissible analytical gap exists between the premises and

FN21.Higgins v. Martin Marietta Corp., 752 F.3d 492, 496 (10th Cir.1985).

FN22.Norris v. Baxter Healthcare Corp., 397 F.3d 878, 886 (10th Cir.2005) (citation and internal quotations omitted).

FN23.See Bourjaily v. Untied States, 483 U.S. 171, 175 (1983).

*6 In this case, the experts' compliance with Rule 26(a)(2)(B) FN24 is also at issue. Rule 26 requires complete disclosure, in an expert witness report provided to all parties, of all opinions an expert will give.FN25Rule 37 provides an enforcement mechanism for Rule 26.FN26It provides that parties failing to disclose the information Rule 26(a)(2)(B) requires, "unless such failure is harmless[, ... are not] permitted to use as evidence at a trial, at a hearing, or on a motion any ... information not so disclosed."FN27The court addresses the parties' challenges to one another's experts in light of these factors.

FN24.Fed.R.Civ.P. 26(a)(2)(B).

FN25.Id.

A. Dr. Strayhorn

The defendants argue Dr. Strayhorn's testimony is inadmissible because Dr. Strayhorn lacks the qualifications to proffer opinions on forensic pathology, and his opinions lack factual basis.

As an initial matter, the court shares the defendants' concerns about Dr. Strayhorn's qualifications to proffer opinions on forensic pathology matters. The plaintiff argues Dr. Strayhorn's qualifications affect only the weight to be given to his testimony, not its admissibility. However, under Rule 702, to proffer expert testimony about a matter, the individual must be qualified.FN28 And qualification of witnesses is a preliminary question for the court.FN29Even ignoring the glaring fact that Dr. Strayhorn is Mr. Boyett's brother-in-law, the plaintiff's own expert, Dr. Frederick Lovell, testified Dr. Strayhorn is unqualified to render opinions on forensic pathology issues.FN30

FN28.Id.

FN29.Fed.R.Evid. 104(a).

FN30. Reply Mem. in Support of Officer Defs.' Mot. for Summ. J., Docket No. 152, Exh. 4, Lovell Depo. 23-24.

Dr. Strayhorn's lack of qualification is only the first problem. Even if he were fully qualified to opine as to the cause and manner of Mr. Boyett's death, the court must still strike Dr. Strayhorn's reports and affidavit. At issue are: Dr. Eugene Strayhorn's first report, dated September 25, 2003; FN31 Dr. Strayhorn's second report, dated September 15, 2005; FN32 and Dr. Strayhorn's affidavit, which is undated.FN33To oppose a motion for summary judgment, the nonmoving party must "go beyond the pleadings and 'set forth facts' that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the non-movant."FN34Only sworn statements are admissible at trial.FN35

FN31.Docket No. 79, Exh. 8.

FN32.Docket No. 79, Exh. 13.

FN33.Docket No. 79, Exh. 18.

FN34.Alder v. Wal-Mart Stores, Inc., 144 F.3d 664, 671 (10th Cir.1998).

FN35.SeeFed.R.Evid. 602.

Dr. Strayhorn submitted neither of his reports under oath, and Dr. Strayhorn was not deposed. Because neither of Dr. Strayhorn's reports are contained in sworn affidavits or accompanied by a declaration that the statements therein are offered under the penalty of perjury, they cannot affect the defendants' otherwise proper motions for summary judgment.

This is no mere technical quibble. The defendants first challenged the plaintiff with regard to this issue in February 2006. This challenge provided the plaintiff with notice its evidence failed to conform to the requirements of the Federal Rules of Civil Procedure, because the plaintiff had neglected to submit various statements in a manner "as would be admissible in evidence" at trial.FN36Since this time, the plaintiff has had numerous opportunities to resubmit its evidence in the proper form, including at the summary judgment hearing on September 28, 2006, but has failed to do so.

FN36.SeeFed.R.Civ.P. 56(e).

*7 Besides this obvious and fatal problem, Dr. Strayhorn's first report is dated only a couple of weeks after Mr. Boyett died, and over a year before the case was filed. In other words, he reached his report conclusions without the benefit of any of the materials obtained via discovery, many of which may have undermined his original conclusions. Further, Dr. Strayhorn's first report

failed to specifically list the materials he reviewed. His reference to his "[r]eview of jail log and other documents"FN37 is insufficient to inform the court, pursuant to Rule 702, whether his report was based on sufficient facts and data. In addition, Dr. Strayhorn's unsworn statements fail tests of reliability. For example, Dr. Strayhorn observed that no records explained the mechanism of injury of Mr. Boyett's omental hematoma. But this observation was in error. In an operative report, Dr. Miller, the physician who performed hernia surgery on Mr. Boyett in July 2003, explained the omental bruise resulted from the surgery. A simple review of the evidence would have explained the existence of this condition. This failure to review the evidence demonstrates why Dr. Strayhorn's opinions fail the reliability standards of Daubert and Rule 702.

FN37.Docket No. 71, Exh. 3.

Even Dr. Strayhorn's more limited, sworn statement fails due to lack of reliability. Interestingly, in the only sworn statement Dr. Strayhorn submitted, he retreated from his unsworn claims that Mr. Boyett was "sodomized ... beaten and murdered." FN38Instead, Dr. Strayhorn claimed only that it "constitutes a violation of the standard of medical care and reckless indifference" to fail to medically assess or have a physician assess Mr. Boyett's complaint of internal bleeding.FN39This statement fails to recount any principles or methods Dr. Strayhorn relied on in reaching his conclusions. Similar to

his first report, Dr. Strayhorn vaguely references jail logs and depositions in his affidavit but neglects to identify which logs and depositions he reviewed or on what he bases his opinion. This makes it impossible to identify which sources, if any, Dr. Strayhorn relied on to support his claims. Indeed, the records Dr. Strayhorn reviewed may have omitted a reference to a medical assessment for Mr. Boyett's internal bleeding, but other records may have contained such a reference.

FN38.Docket No. 79, Exh. 8, Strayhorn Report 4.

FN39.Docket 79, Exh. 18, Strayhorn Aff. 2-3.

Further, to be admissible, expert opinions must be based on reasonable scientific certainty rather than mere possibility,FN40 but Dr. Strayhorn's affidavit evinces speculation. For example, Dr. Strayhorn stated, "[a]s a medical provider at Purgatory, Nurse McKinnon would have had access to the Purgatory medical records."FN41The highlighted language indicates Dr. Strayhorn was not relying on a source conclusively stating Nurse McKinnon actually did have access to such records, but rather, he was simply speculating. Impermissibly, he rests his affidavit conclusions, in part, on this speculation. Finally, nowhere does Dr. Strayhorn claim he made his opinions to a reasonable degree of medical or scientific certainty.

FN40.Higgins, 752 F.3d at 496.

FN41.Docket No. 79, Exh. 18, Strayhorn Aff. 2 (emphasis added).

*8 Because two of Dr. Strayhorn's statements are unsworn and unreliable, and his only sworn statement fails to meet the reliability standards set out in Daubert and Rule 702, the court strikes Dr. Strayhorn's reports and affidavit.

B. Dr. Lara

The court also finds it necessary to strike Dr. Lara's report and testimony in this case. Dr. Lara submitted a report dated March 28, 2006.FN42Unlike both of Dr. Strayhorn's reports, Dr. Lara submitted this report under the penalty of perjury. He also gave deposition testimony on July 18, 2006. However, like Dr. Strayhorn, Dr. Lara is not a forensic pathologist, which calls into question his qualifications to comment on matters of forensic pathology.

FN42.SeeDocket No. 116, Ex.4.

Further, in violation of Rule 26(a)(2)(B), Dr. Lara failed to indicate on what he based his medical opinions.FN43This failure also runs contrary to Rule 702 and Daubert,FN44 because without information as what underlying evidence Dr. Lara evaluated and relied upon, the court cannot possibly determine if the evidence is sufficient to support his opinion. The plaintiff, in its opposition

to the defendants' motion in limine, provided an extensive list of evidence Dr. Lara supposedly reviewed and relied upon. However, Dr. Lara himself never indicated he relied on such evidence-in fact, in his deposition, Dr. Lara plainly stated he had not reviewed much of the material he had been provided. For example, Dr. Lara admitted to not having reviewed the Hurricane City police reports, any of the other witnesses' depositions, the pleadings in the case, or any reports from experts other than Dr. Graham.

FN43.SeeFed.R.Civ.P. 26(a)(2)(B).

FN44.Fed.R.Evid. 702.

Dr. Lara's failure to meet the reliability standard for medical testimony, under Daubert and Rule 702, is tied to his failure to review the relevant evidence. In his report, Dr. Lara not only neglected to indicate the basis for his opinions, he failed to point to any facts supporting them. For instance, Dr. Lara concluded, without any factual reference, that if Mr. Boyett had "received proper medical care, he would have survived the terrible ordeal he was dealt" and that "[i]t is clearly apparent that [Mr. Boyett] did not die of Coronary Artery Disease."FN45However, nothing in Dr. Lara's report supports these sweeping statements. Similarly, nothing in his report supports his quite serious charge that "more likely than not, [this trauma] was done to [Mr. Boyett] by someone with

access to him the night before his death."FN46It is entirely unclear how Dr. Lara could reach this conclusion, to a reasonable degree of medical certainty, when Dr. Leis reached no conclusions even remotely similar. It does not reflect sound scientific principles for Dr. Lara, a non-pathologist who did not examine the record or have the benefit of examining the body, to reach more specific conclusions about Mr. Boyett's alleged attack and attacker than the actual medical examiner-one of only two physicians who physically examined Mr. Boyett's body. This rests in the realm of speculation, not reasonable scientific certainty.

FN45.Docket No. 116, Ex. 4, at 2.

FN46.Id.

*9 Dr. Lara's deposition fails to cure the deficiencies in his report. In fact, Dr. Lara's deposition only bolsters the court's decision to strike his testimony. For one thing, in his deposition, Dr. Lara admitted he has no idea how the injuries to Mr. Boyett were caused. For another thing, in his report and his deposition, Dr. Lara advanced detailed opinions about Mr. Boyett's alleged oversedation and how this oversedation violated the medical standard of care and contributed to Mr. Boyett's demise. But Dr. Lara knew nothing of the levels of medications in Mr. Boyett's blood stream or of his blood culture results. He never saw the toxicology report from

Mr. Boyett's autopsy, although he admitted the report would be important in order to form opinions with regard Mr. Boyett's level of sedation. Even though he was completely unaware of the results of the toxicology report-a report that showed Mr. Boyett had no elevated levels of any medication-Dr. Lara concluded Mr. Boyett had been oversedated. This can only qualify as uninformed speculation.

Similarly, Dr. Lara made no attempt to support the other conclusions in his report with actual evidence from the case. For example, as a basis for his statement that Mr. Boyett had not died of coronary artery disease, Dr. Lara explained that in the case of a heart attack, there is evident necrosis of cells, but there was no such evidence in Mr. Boyett's case. However, in Dr. Leis' deposition (which Dr. Lara had not reviewed), he explained that Mr. Boyett died within minutes of his arrhythmia onset, and Dr. Anderson, the defendants' cardiology expert, explained Mr. Boyett died so quickly, no heart damage occurred. Further, a report of a plaintiff expert (which Dr. Lara also had not reviewed), explained Mr. Boyett's death resulted from "cardiac arrest." FN47Finally, Dr. Lara's testimony undercut his own conclusions in his report. For instance, in his deposition, Dr. Lara explained that when he wrote that correctional staff had acted deliberately indifferent to Mr. Boyett's medical needs, he meant only that they had been medically negligent.

FN47.SeeDocket No. 184, Ex. A, Lovell Report 6.

To be sure, scientific experts may differ on such subjects as these. But here, put simply, Dr. Lara offered no evidentiary basis for his opinions and no methodology or principles on which he based his opinions. This proves fatal to his report and testimony. Because Dr. Lara points to no evidence to support his conclusions about the cause and manner of Mr. Boyett's death, his opinions about Mr. Boyett surviving if he had received appropriate treatment are speculative and irrelevant. The court, therefore, finds it necessary to strike Dr. Lara's report and testimony pursuant to Daubert,Rule 702,FN48 and Rule 26(a)(2)(B).FN49

FN48.Fed.R.Evid. 702.

FN49.Fed.R.Civ.P. 26(a)(2)(B).

C. Dr. Lovell

The court must strike Dr. Lovell's report and testimony for reliability reasons as well. Unlike Dr. Strayhorn and Dr. Lara, Dr. Lovell at least identified the materials on which he relied in reaching his conclusions. But Dr. Lovell failed to set forth specific facts to support his conclusions, and his conclusions only rose to the level of possibility, not probability.FN50

FN50.See Higgins, 752 F.3d at 496.

*10 Dr. Lovell's deposition testimony violates Rule 26 because in his deposition, Dr. Lovell proffers opinions on issues never disclosed previously. For example, only in his deposition does Dr. Lovell address the possibility of Mr. Boyett suffering seizures. This is problematic due to lack of disclosure and because no admissible evidence supports a theory that Mr. Boyett suffered from seizures. A comment by Dr. Lies constitutes the only evidence at issue in the summary judgment motions that Mr. Boyett suffered from seizures. In his deposition, Dr. Leis indicated that Shane Copeland, a Hurricane, Utah, police officer, spoke to some inmates after Mr. Boyett's death. The inmates allegedly advised Officer Copeland that Mr. Boyett shook after he fell down the stairs. This information, hearsay within hearsay, is inadmissible evidence. Not only does Dr. Lovell's deposition testimony about seizures violate Rule 26, without any further evidence of Mr. Boyett suffering from seizures at the jail, Dr. Lovell's theories on the matter constitute speculation-and speculative expert testimony is inadmissible.

Dr. Lovell's other conclusions are also too speculative to constitute reliable medical opinions. Dr. Lovell's statements in his deposition undercut any semblance of reliability in his report. For example, in his report, Dr. Lovell questioned whether Mr. Boyett'sblocked artery had contributed to his demise. But in his deposition, Dr. Lovell acknowledged that Mr. Boyett's left

anterior descending artery-an artery Dr. Lovell said is called the "widowmaker"-was ninety percent occluded. Dr. Lovell also indicated that even a seventy percent occlusion can result in instant death. Dr. Lovell's other theories are similarly unreliable-his own statements undermine his conclusions. For instance, Dr. Lovell argued Mr. Boyett'sanal laceration"was undoubtedly penetration with a blunt foreign body," and his head injury was likely caused by "an external blow." FN51Yet in the very same report, Dr. Lovell stated with regard to Mr. Boyett's injuries, that "it is difficult to fin[d] documentation as to exactly when and how these occurred."FN52It is not clear how Dr. Lovell can note the lack of information as to the injuries in one breath then proffer theories as to the "undoubted [ ]" cause in the next.FN53This approach reveals the suppositional nature of his conclusions. Similarly suppositional is Dr. Lovell's conclusion that because Mr. Boyett did not complain of pain to his ribs, his rib fractures"probably occurred near the end of his life."FN54Even if Dr. Lovell had not added the prominent qualifier, "probably," which undercuts the conclusive nature of his statement, his statement fails to assist the trier of fact. It does not provide a specific enough time frame to implicate any particular individuals, and it does not describe a mechanism of injury. Dr. Lovell's deposition testimony that the defendants' actions constituted negligence is irrelevant as well, as negligence is not at issue in this case-negligence fails to rise to a § 1983 violation.FN55

FN51.Docket No. 116, Exh 4, Lovell Report 5.

FN52.Id.

FN53.Id.

FN54.Id.

FN55.Farmer v. Brennan, 511 U.S. 825, 835 (1994).

*11 Because the conclusions in Dr. Lovell's report and testimony are too speculative to meet the requirements of Rule 702 and Daubert, the court finds it necessary to strike these statements.

D. Dr. Graham

Dr. Graham's second report must be stricken, as Dr. Graham never declared it was offered under the penalty of perjury. The party opposing a summary judgment motion must present evidence that would be admissible at trial FN56-only sworn statements are admissible.FN57

FN56.Alder, 144 F.3d at 671.

FN57.SeeFed.R.Evid. 602.

Because Dr. Graham's second report is not contained in a sworn affidavit or accompanied by a declaration that the statements therein are offered under the penalty of perjury, it cannot affect the defendants' proper motions for summary judgment. Again, this is no mere technicality, but an important check on scurrilous unsworn allegations, as the facts of this case reveal. Initially, the plaintiff even submitted Dr. Graham's autopsy report as an unsworn report, but on July 20, 2006, the plaintiff re-submitted this report, accompanied by an affidavit declaring the statements it contained to be true.FN58The court finds it interesting that Dr. Graham's sworn statement only includes his autopsy report-not his second report, which contained potentially inflammatory statements not found in his autopsy report. For instance, only in the unsworn, second report did Dr. Graham indicate that air in Mr. Boyett's scrotum may have resulted from an anal laceration.

FN58.SeeDocket No. 148, Exh. 22.

For purposes of this summary judgment order, therefore, the court cannot consider Dr. Graham's unsworn second expert statement. The court only considers the findings set forth in Dr. Graham's autopsy report and addendum. Because this order disposes of the plaintiff's claims, the court does not reach the parties' dispute as to the appropriateness of Dr. Graham offering opinions at trial that fall outside of the objective findings in his autopsy report.

E. Other Daubert Motions

The remainder of the parties' Daubert motions and motions in limine require no extensive discussion. Briefly, in addition to the previously-discussed experts, the defendants challenged the testimony of Joseph E. Kasperick and Roger Clark. For its part, the plaintiff challenged the statements of Dr. Edward Lies and Rudy Riet. The plaintiff failed to even object to the defendants' challenge to Mr. Kasperick. The court, therefore, grants the defendants' motion as to Mr. Kasperick and strikes his testimony.

The court cannot strike the testimony of Dr. Leis, however. The plaintiff argued Dr. Leis' trial testimony should be stricken because the defendants failed to designate Dr. Leis as an expert in accordance with Rule 26. In its motion, the plaintiff only challenged Dr. Leis' possible trial testimony based on lack of Rule-26 notice, not the validity of Dr. Lies' report or opinions. However, the plaintiff's notice argument fails because the plaintiff's own initial disclosures listed Dr. Lies as someone with knowledge of Mr. Boyett's death-obviously the plaintiff was not prejudiced by the lack of disclosures.

*12 Even if the lack-of-notice argument were valid, the plaintiff's challenge would fail because Dr. Lies falls outside the scope of Rule 26. The defendants did not retain or employ Dr. Lies in

any fashion. Instead, Dr. Leis' involvement in the case came about by virtue of his job as State Medical Examiner. With regard to Mr. Boyett, Dr. Leis simply performed his legal duty, which includes certifying the cause and manner of death of certain individuals. Because of Dr. Lies' status as an independent medical examiner, either side could call him as a "fact" witness-i.e., as an eyewitness to facts which are in dispute about the nature of the medical examination. In fact, the plaintiff relied on Dr. Lies' statements and report in opposing the defendants' motions for summary judgment. Because the plaintiff made only a Rule 26 challenge to Dr. Leis' testimony and Dr. Lies falls outside the scope of Rule 26, there is no basis to strike his testimony.

The court need not address the admissibility of the statements of Mr. Clark or Mr. Riet because neither party relied on any statements of Mr. Clark or Mr. Riet in the summary judgment motions. And the court has not gone outside the motion evidence to consider any of Mr. Clark's or Mr. Riet's statements. As a practical matter, therefore, it is unnecessary for the court to address these motions.

In sum, because they fail to meet the reliability requirements of Daubert and Rule 702, the court must strike the reports and testimony of Dr. Lara and Dr. Lovell, and the affidavit of Dr. Strayhorn. The court cannot consider either of Dr. Strayhorn's reports or Dr. Graham's second report for purposes of summary judgment-despite the

plaintiff's many chances to cure this problem, all three of these reports remain unsworn. Further, as the plaintiff neglected to oppose the defendants' challenge to Mr. Kasperick's testimony, the court strikes his statements. Finally, as Dr. Leis falls outside the scope of Rule 26, the court finds no basis for striking his statements.

II. Allegations of Physical Attack

The expert reports, which fail to qualify as admissible evidence, constitute the only real support for the plaintiff's allegations of rape, assault, and murder. Even if this evidence were properly before the court, it provides little support for the premise that Mr. Boyett suffered some sort of physical attack and no support for the premise that the defendants had any connection to any attack. In brief, the plaintiff has failed to identify an attacker or specify what acts by this unknown attacker caused Mr. Boyett's injuries, or how, or when, or where.

Although the plaintiff did not primarily cite to Dr. Lovell's or Dr. Lara's reports in support of its claim of physical assault, out of an abundance of caution, the court reviewed these reports and found some evidence provisionally supporting a theory of physical attack. For instance, Dr. Lara concluded it was unlikely Mr. Boyett caused his own broken ribs or anal laceration. And Dr. Lovell argued the anal laceration"was undoubtedly penetration with a blunt foreign body," and the

head injury was likely caused by "an external blow." FN59He offered no opinion as to the cause of the rib fractures.

FN59.Docket No. 116, Exh 4, Lovell Report 5.

*13 Even if this evidence were admissible, the plaintiff's § 1983 claim based on a physical attack of Mr. Boyett would fail. The fatal flaw in the plaintiff's claim, as in the Tenth Circuit case of Barney v. Pulsipher,FN60 is the lack of an affirmative link to corrections officials. In Barney, the plaintiff filed suit pursuant to § 1983, against Gerald Pulsipher, a corrections officer, the sheriff of the Box Elder County Sheriff's Office, and three county commissioners who were responsible for the jail.FN61 The Tenth Circuit reviewed the district court's grant of summary judgment to the sheriff and the commissioners. While Ms. Barney was confined in the Box Elder jail serving a forty-eight hour sentence, Mr. Pulsipher took Ms. Barney to an unmonitored area of the jail, in violation of jail policy, and sexually assaulted her.FN62Within the same general time frame, Mr. Pulsipher had sexually assaulted another female inmate in much the same manner.FN63 The sheriff's office had hired Mr. Pulsipher pursuant to its standard procedures, and Mr. Pulsipher had completed the requisite training to become a correctional officer.FN64The sexual assaults perpetrated by Mr. Pulsipher were the only incidents of sexual misconduct of which the sheriff or commissioners were aware.FN65The court concluded the defendants could not face

municipal liability-liability in their official capacities-because they had no notice of a pattern of violations or a deficient training program.FN66 Similarly, apart from the claims against Mr. Pulsipher, the court denied Ms. Barney's claims against all defendants based on individual liability. Absent evidence of prior sexual misconduct by Mr. Pulsipher or previous sexual assaults by other Box Elder jailers, the court could not find the sheriff or commissioners acted with deliberate indifference toward Ms. Barney.FN67The court clarified that even the "inexcusable and outrageous" behavior of Mr. Pulsipher was insufficient to impose liability on the municipality, the sheriff, or the commissioners.FN68

FN60.143 F.3d 1299 (10th Cir.1998).

FN61.Id. at 1305-06.

FN62.Id. at 1305.

FN63.Id. at 1304-05.

FN64.Id. at 1305.

FN65.Id. at 1306.

FN66.Id. at 1307-08.

FN67.Id. at 1312.

FN68.Id. at 1313.

In Barney, the plaintiff established who perpetrated the offense, what the act consisted of, when it occurred, where it occurred, and who else was involved. Yet even in the face of these details about the egregious acts by Mr. Pulsipher, the court affirmed summary judgment for the defendants based on the lack of connection between corrections officials and the abuse. In this case, the plaintiff has built ill-defined claims that Mr. Boyett was physically abused solely on injuries discovered only after Mr. Boyett's death. There is such a dearth of evidence supporting this theory that in its pleadings, the plaintiff failed to even make specific allegations-let alone produce evidence-as to who abused Mr. Boyett, what exactly occurred, when it occurred, or who else was involved. Other than broad, general claims of "correctional staff" perpetrating unspecified abuses, the plaintiff failed to craft a physical attack allegation at all. Not only does this prevent the court from tying the alleged abuses Mr. Boyett suffered to a specific perpetrator, it frustrates any attempt to connect corrections officials to the alleged abuse.

*14 The court cannot find any exceptions to the fatal nature of this flaw in the plaintiff's claims of physical abuse. Therefore, the court turns to the issues the plaintiff presented that are worthy of more extended discussion-the substantive claims

against individuals of failure to provide adequate medical care, supervisory liability, and municipality liability.

III. Claims Against Individual Officers-Excessive Force and Inadequate Medical Care

A. Qualified Immunity Standard

In response to the plaintiff's § 1983 allegations, the individual defendants have invoked the defense of qualified immunity. Actions for damages provide an important remedy for those injured by abuse of governmental authority, but such actions also have potential to subject officials to harassing, costly litigation and to inhibit performance of their duties.FN69 The affirmative defense of qualified immunity balances these competing interests by protecting "all but the plainly incompetent or those who knowingly violate the law."FN70Government officials are entitled to qualified immunity "in all but the most exceptional cases."FN71Whether qualified immunity exists is a "purely legal question." FN72

FN69.Anderson v. Creighton, 483 U.S. 635, 639 (1987).

FN70.Malley v. Briggs, 475 U.S. 335, 341 (1986).

FN71.Tonkovic v. Kan. Bd. of Regents, 159 F.3d 504, 516 (10th Cir.1998).

FN72.Siegert v. Gilley, 500 U.S. 226, 232 (1991).

Due to the underlying purposes of qualified immunity, courts evaluate summary judgment motions in qualified immunity cases differently than general summary judgment motions.FN73After a defendant asserts a qualified immunity defense, the plaintiff has the burden of satisfying a two-part test.FN74As part of this "heavy two-part burden," FN75 the plaintiff must establish the defendant's acts or omissions violated a constitutional or statutory right.FN76Next, the plaintiff must show the right at issue was clearly established at the time of the defendant's unlawful conduct.FN77In assessing whether a right was clearly established, the court must look at the objective legal reasonableness at the time of the challenged action and ask if "the right [was] sufficiently clear that a reasonable officer would understand that what he [was] doing violate[d] that right."FN78If the plaintiff fails to satisfy any part of the inquiry, the court must grant qualified immunity to the defendants.FN79

FN73.Nelson v. McMullen, 207 F.3d 1202, 1205-06 (10th Cir.2000).

FN74.Scull v. New Mexico, 236 F.3d 588, 595 (10th Cir.2000).

FN75.Albright v. Rodriguez, 51 F.3d 1531, 1534 (10th Cir.1995).

FN76.Id.

FN77.Id.

FN78.Wilson v. Layne, 526 U.S. 603, 615 (1999).

FN79.Albright, 51 F.3d at 1535.

If, however, the plaintiff succeeds in establishing a violation of a clearly established right, the defendant has the burden to prove "there are no genuine issues of material fact and he or she is entitled to judgment as a matter of law."FN80Although the court views the evidence in the light most favorable to the nonmoving party, the record must clearly establish the plaintiff has satisfied its heavy two-part burden; otherwise, the defendants are entitled to qualified immunity.FN81In this case, the plaintiff has not met its heavy burden, so the court must grant qualified immunity to the defendants.

FN80.Id. (citing Hinton v. City of Elwood, 997 F.2d 774, 779 (10th Cir.1993)).

FN81.Medina v. Cram, 252 F.3d 1124, 1128 (10th Cir.2001).

B. Excessive Force

The plaintiff alleges Deputy Kounalis and Corporal Redford should face § 1983 liability for using excessive force on Mr. Boyett. Use of excessive force violates the Eighth Amendment's prohibition against cruel and unusual punishment,FN82 and due process requires the Eighth Amendment standard be applied to pretrial detainees, not just those adjudicated guilty. To succeed on an excessive force claim, the plaintiff must show (1) objectively, the alleged bad act was harmful enough to establish a constitutional violation, and (2) the defendants acted with a sufficiently culpable mens rea.FN83"The objective component ... is contextual and responsive to contemporary standards of decency. The subjective element ... turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."FN84

FN82.Norton v. City of Marietta, 432 F.3d 1145, 1154 (10th Cir.2005).

FN83.Id.

FN84.Smith v. Cochran, 339 F.3d 1205, 1212 (10th Cir.2003).

*15 In this case, there is contested evidence as to whether force was used on Mr. Boyett at all. However, this dispute is immaterial because even

if the court accepted the assertion that force was used on Mr. Boyett, there is only attenuated circumstantial evidence the force occurred at the hands of either Corporal Redford or Deputy Kounalis. However, at the summary judgment hearing on September 28, 2006, plaintiff's counsel presented an elaborate theory relating to the cause of Mr. Boyett'shead injury. Specifically, counsel speculated Deputy Kounalis entered the room where Mr. Boyett was being held. He saw Mr. Boyett making a phone call, which Mr. Boyett had allegedly been forbidden to do. Because Deputy Kounalis suspected Mr. Boyett was calling his family to complain about his medical care, he hit Mr. Boyett on the head with the phone. Before presenting this theory, plaintiff's counsel conjectured that Mr. Boyett already suffered from broken ribs by the time he taken from this room to the infirmary. Considering that in its pleadings, the plaintiff repeatedly referred to Deputy Kounalis' statement hat he had used "knee strikes"-a control technique-on inmates before, plaintiff's counsel seemed to be implying Deputy Kounalis had also broken Mr. Boyett's ribs at this time.

The only admissible evidence in support of the plaintiff's claim of force is: (1) the autopsy of Mr. Boyett's body revealed broken ribs and a superficial head laceration, (2) the cause of these injuries is unexplained, (3) Deputy Kounalis spent a few moments alone with Mr. Boyett during his "head count," (4) the first person who noticed Mr. Boyett'shead injury was Deputy Kounalis. To

allow the plaintiff to argue its excessive force theory to a jury based only on this evidence would stand contrary to qualified immunity principles as a whole, as well as the need for actual evidence to oppose summary judgment motions.

The fact that the injuries "had to have happened somehow" FN85 and Deputy Kounalis had a brief chance to cause them is insufficient for a reasonable trier of fact to find Deputy Kounalis actually caused the injuries. Deputy Kounalis maintained Mr. Boyett exhibited the head injury before he entered Mr. Boyett's cell, and he had no knowledge of the rib injury. He repeatedly denied having caused Mr. Boyett'shead injury or having any knowledge of how it occurred. Other than to guide Mr. Boyett to the infirmary with Corporal Redford's assistance, Deputy Kounalis vowed he never physically touched Mr. Boyett. The plaintiff offers only wild speculation to counter this evidence, pointing out there is no evidence Deputy Kounalis did not injure Mr. Boyett. This kind of "guilty until proven innocent" argument cannot defeat summary judgment. That Deputy Kounalis used force is but one of many possible explanations for Mr. Boyett's injury. It is at least as likely that another inmate caused it. And perhaps the most reasonable inference is that Mr. Boyett-who had banged his head on the wall of his cell throughout much of a shift the prior day-caused the injury to himself. In short, there is insufficient evidence for the court to link these injuries to any particular perpetrator.

FN85. Pl.'s Mem. in Opp'n to Officer Defs.' Mot. for Summ. J., Docket No. 148, Exh. 9, Kounalis Depo. 53.

*16 Even assuming the court agreed the evidence showed Deputy Kounalis caused the injury to Mr. Boyett, the evidence would still be insufficient to establish a § 1983 violation based on excessive force. The plaintiff has failed to meet its burden to provide evidence suggesting the injury was maliciously caused for the purpose of causing harm as opposed to for the purpose of maintaining discipline.FN86

FN86.See Cochran, 339 F.3d at 1212.

There is no evidence Corporal Redford spent any time alone with Mr. Boyett, so the excessive force claim is even weaker as pertains to him. And although the plaintiff alleges Mr. Boyett suffered a litany of other injuries, the plaintiff has failed to provide any evidence-even circumstantial-any of them were at the hands of Corporal Redford or Deputy Kounalis. The plaintiff's claims of excessive force, therefore, fail as to Corporal Redford and Deputy Kounalis. Just as the plaintiff has failed to provide evidence supporting § 1983 liability based on excessive force, it has failed to establish liability for the alleged provision of inadequate medical care.

C. Deliberate Indifference to Medical Needs

The plaintiff has failed to present evidence sufficient for a jury to reasonably hold any of the individual defendants liable for the alleged inadequate medical care of Mr. Boyett. The government has an "obligation to provide medical care for those whom it is punishing by incarceration."FN87Deficient medical care may constitute a constitutional violation-"deliberate indifference to an inmate's serious medical needs is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment."FN88Although the Eighth Amendment only applies after an inmate has been adjudicated as guilty, due process requires the same standards be applied to pretrial detainees.FN89

FN87.Estelle v. Gamble, 429 U.S. 97, 103 (1976).

FN88.Mata v. Saiz, 427 F.3d 745, 751 (10th Cir.2005).

FN89.See Garcia v. Salt Lake County, 768 F.2d 303, 307 (10th Cir.1985).

Deliberate indifference involves both an objective and a subjective component.FN90 If the medical deprivation is "sufficiently serious," it meets the objective component.FN91"[A] medical need is sufficiently serious if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's

attention."FN92The subjective component requires a mens rea on par with criminal recklessness.FN93The plaintiff must establish both that the official knew of an "an excessive risk to inmate health or safety" and that the official disregarded this risk.FN94 It is not enough that the official should have known of the potential harm; the "official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."FN95"If an official is aware of the potential for harm but takes reasonable efforts to avoid or alleviate that harm, he bears no liability under this standard."FN96Further, officials' knowledge will not necessarily be inferred even in the face of what seems to be an obvious risk.

FN90.Sealock v. Colorado, 218 F.3d 1205, 1209 (10th Cir.2000); see also Farmer v. Brennan, 511 U.S. 825, 834 (1994).

FN91.Farmer, 511 U.S. at 834.

FN92.Hunt v. Uphoff, 199 F.3d 1220, 1224 (10th Cir.1999) (quoting Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir.1980)).

FN93.Farmer, 511 U.S. at 836.

FN94.Id. at 837.

FN95.Id.

FN96.Despain v. Uphoff, 264 F.3d 965, 975 (10th Cir.2001).

*17 Prison officials ... might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.FN97

FN97.Farmer, 511 U.S. at 844.

"[S]ummary judgment is appropriate where there is a lack of personal participation or knowledge of a plaintiff's alleged serious medical need."FN98

FN98.Bafia v. Bd. of County Commr's, 2006 U.S. Dist. LEXIS 14347, *42-43 (D.Colo. Mar. 17, 2006) (citing Worrell v. Henry, 219 F.3d 1197, 1214 (10th Cir.2000)).

The Tenth Circuit case of Sealock v. ColoradoFN99 is instructive here. In Sealock, a prisoner who suffered a heart attack while incarcerated sued prison officials pursuant to § 1983 for failure to provide adequate medical care.FN100Throughout the course of a night, the inmate summoned numerous correctional officers, reporting pain in his chest, trouble breathing, and

vomiting.FN101Correctional staff repeatedly told the inmate he would have to wait until morning because no medical personnel were on staff at that hour.FN102In the morning, a nurse examined the inmate and told him he just had the flu.FN103The nurse claimed she then spoke to the physician's assistant and relayed the inmate's symptoms, including "throbbing pressure pain in chest and throat."FN104The physician's assistant testified he never heard the report of chest pain, claiming that if he had, he would have called an ambulance.FN105The court determined the corrections officials, including the nurse, lacked deliberate indifference.FN106 However, the court remanded the case with regard to the liability of the physician's assistant-the trial court needed to assess his knowledge.FN107 The Tenth Circuit concluded that unless the physician's assistant "knew that [the prisoner] had unexplained chest pain" his actions do not constitute deliberate indifference but, rather, mere medical malpractice or negligence.FN108

FN99.218 F.3d 1205 (10th Cir.2000).

FN100.Id. at 1209.

FN101.Id.

FN102.Id. at 1208.

FN103.Id.

FN104.Id.

FN105.Id.

FN106.Id. at 1211.

FN107.Id. at 1212.

FN108.Id. at 1211-12.

As with Sealock, the plaintiff has failed to show any of the defendants had knowledge of Mr. Boyett's serious medical conditions or that their actions constituted anything other than medical malpractice, at most.

1. Defendant Eugene Redford

The claim against Corporal Redford fails for lack of evidence of deliberate indifference. Corporal Redford's only contact with Mr. Boyett occurred on September 5, 2003. Deputy Kounalis noticed a bloody spot on the back of Mr. Boyett's head, so he called for the assistance of his supervisor, Corporal Redford. Corporal Redford accompanied Mr. Boyett to the infirmary but had no other contact with Mr. Boyett. This evidence does not show deliberate indifference by Corporal Redford; he did not stand by and ignore a serious medical need of which he was aware. First, the head injury fails to qualify as a serious medical need. Corporal Redford said he "guess[ed]" Mr. Boyett's

head laceration was "maybe" a serious medical injury.FN109However, Corporal Redford lacked medical training to even make such a determination. Nurse Hanson, who treated the injury, found no need for sutures. And although Dr. Leis, reviewing the injury with the benefit of hindsight, expressed an opinion it should have been sutured, he also classed the injury as "superficial." A superficial head injury, even one requiring sutures, does not qualify as a serious medical need. Next, even if it were a serious medical need, Corporal Redford acted in a manner establishing he was not deliberately indifferent-he took a patient requiring medical care to the infirmary to have his injury treated by medical staff. To ask Corporal Redford to second-guess the medical opinion of Nurse Hanson regarding the need for sutures asks too much.

FN109. Pl.'s Mem. in Opp'n to Officer Defs.' Mot. for Summ. J., Docket No. 148, Exh. 2, Redford Depo. 129.

*18 The plaintiff implies Corporal Redford possessed knowledge of additional injuries of Mr. Boyett, such as his broken ribs and anal laceration. However, this fails to support a finding of deliberate indifference because Corporal Redford first became aware of the additional injuries long after Mr. Boyett's death-an FBI agent informed him of the injuries at that time. At the time of Mr. Boyett's incarceration, Corporal Redford only knew of Mr. Boyett'shead injury, but no other injuries or medical conditions. Therefore,

Corporal Redford was unaware of an actual danger and did not even know of "underlying facts indicating a sufficiently substantial danger."FN110Based on this, a reasonable juror could not find Corporal Redford was deliberately indifferent to Mr. Boyett's medical needs.

FN110.Farmer, 511 U.S. at 844.

2. Defendant Raymound Kounalis

As with Corporal Redford, a factfinder could not infer from the evidence that Deputy Kounalis acted with deliberate indifference to Mr. Boyett's medical needs. Deputy Kounalis' only contact with Mr. Boyett consisted of noticing a bloody spot on his head and some blood on his back during a "head count," and helping Corporal Redford take Mr. Boyett to infirmary. Mr. Boyett'shead injury was the only medical condition requiring treatment of which Deputy Kounalis was aware and, as discussed previously, it was not sufficiently serious to fall within the purview of § 1983 liability for deficient medical care. Also, like Corporal Redford, Deputy Kounalis acted reasonably, considering the extent of his knowledge, by taking Mr. Boyett to the infirmary. And like Corporal Redford, Deputy Kounalis cannot be held liable for Mr. Boyett's additional injuries and conditions, which he had no reason to suspect.

3. Defendant James Hanson

Nurse Hanson's actions do not reveal deliberate indifference to Mr. Boyett's medical needs either. Of Nurse Hanson's extensive contact with Mr. Boyett, the plaintiff only challenges Nurse Hanson's treatment of Mr. Boyett'shead injury and his administration of Thorazine to Mr. Boyett. As discussed previously, Mr. Boyett's "superficial" head injury did not constitute a serious medical need. Further, Nurse Hanson treated the injury as soon as he was made aware of it. He cleaned and evaluated the wound and found sutures to be unnecessary. Dr. Leis' difference in opinion as to the need for sutures is immaterial to the inquiry, as a difference in medical opinion does not constitute deliberate indifference.FN111

FN111.See Estelle, 429 U.S. at 107;see also Perkins v. Kan. Dep't of Corrs., 165 F.3d 803, 811 (10th Cir.1999).

On September 4, 2003, after Mr. Boyett banged his head on the door throughout much of the swing shift, Nurse Hanson determined Mr. Boyett was exhibiting "dangerous behavior." FN112Based on this conclusion, Nurse Hanson administered Thorazine to Mr. Boyett and placed him under observation. After Nurse Hanson treated Mr. Boyett'shead injury on September 5, 2003, he injected Mr. Boyett with another 100 mg of Thorazine to prevent him from harming himself. The plaintiff has not shown these acts constitute deliberate indifference to Mr. Boyett's

serious medical needs. The court has already determined administering Thorazine to Mr. Boyett did not violate his civil rights.FN113Although PA Steele did not specifically prescribe this medication to Mr. Boyett, she was "okay" with it being administered to him: "in the situation that he was in, they were following the protocol and he fit the protocol."FN114PA Steele indicated giving Thorazine pursuant to this protocol met the standard of care, even if she personally did not agree with the protocol itself.FN115Thus, with regard to this claim, the plaintiff has not established Nurse Hanson's actions constituted negligence, let alone that he had a "state of mind more blameworthy than negligence."FN116

FN112. Pl.'s Mem. in Opp'n to Medical Defs.' Mot. for Summ. J., Docket No. 147, at xxx-xxxi.

FN113.See Order Granting Washington County Defs.' Mots. for Summ. J., Docket No. 120, at 11 (Apr. 26, 2006).

FN114. Pl.'s Mem. in Opp'n to Defs.' Mot. for Summ. J., Docket No. 148, Exh. 5, at 79-80.

FN115.Id. at 73.

FN116.Farmer, 511 U.S. at 835.

*19 Nurse Hanson's only other contact with Mr. Boyett consisted of multiple checks on Mr. Boyett during medical rounds and in response to Mr. Boyett's requests to see medical staff. However, the evidence does not show Nurse Hanson possessed any knowledge of Mr. Boyett's other alleged injuries or conditions. Mr. Boyett never complained of problems from which an inference could be drawn that he suffered from other medical conditions. Further, there is no evidence Mr. Boyett exhibited other symptoms indicating these conditions. Similar to the medical providers in Sealock, unless Nurse Hanson knew of a symptom, such as chest pain, that would result in substantial harm, he was not deliberately indifferent to Mr. Boyett's medical needs by delaying or denying treatment for the condition. Put simply, the plaintiff has not shown Nurse Hanson learned of and then "disregard[ed] an excessive risk to [Mr. Boyett's] health or safety. FN117

FN117.See id. at 837.

Based on these undisputed facts, the plaintiff has not satisfied the components of the deliberate indifference inquiry with regard to Nurse Hanson.

4. Defendant Destiny Hummer

The plaintiff has also failed to show Nurse Hummer's actions constituted deliberate indifference to Mr. Boyett's medical needs. Nurse

Hummer's only challenged contact with Mr. Boyett consisted of injecting him with Thorazine. However, this evidence is insufficient to establish deliberate indifference to Mr. Boyett's serious medical needs. On September 5, 2003, at 7:45 p.m., Ms. Hummer injected Mr. Boyett with 100 mg of Thorazine, with his consent, to help calm him down. In administering Thorazine, Nurse Hummer followed the same medical protocol Nurse Hanson followed. The plaintiff specifically challenges the administration of this dose by pointing out Nurse Hummer gave it to Mr. Boyett within less than six hours of his prior dose. However, even if this were shown to be in error, at most, this error constitutes medical negligence, which does not equate to a civil rights violation.FN118Further, even if this error had risen to the level of a constitutional injury, the plaintiff has failed to produce evidence this act caused Mr. Boyett substantial harm. Although the exact cause of Mr. Boyett's death is disputed, it is undisputed that in the autopsy of his body, Dr. Leis found no elevated levels of any medication, including Thorazine. Nurse Hummer's only other contact with Mr. Boyett consisted of routine medical checks and responses to his requests to be seen by medical staff. Similar to Nurse Hanson, the evidence does not show Nurse Hummer possessed any knowledge of Mr. Boyett's other alleged injuries or conditions such that she could face liability for not addressing them.

FN118.See Estelle, 429 U.S. at 106.

As there is no evidence Nurse Hummer's actions violated Mr. Boyett's constitutional rights or caused Mr. Boyett substantial harm, the plaintiff's claim against Nurse Hummer fails.

5. Defendant Darryl Tracy McCoy

The plaintiff has also failed to show Nurse McCoy's actions demonstrate deliberate indifference to Mr.Boyett's medical needs. Mr. McCoy's only challenged contact with Mr. Boyett consisted of his treatment of Mr. Boyett after Mr. Boyett fell. On September 3, 2003, Mr. Boyett fell near some stairs. Nurse McCoy responded, after Deputy Keil notified him of the fall by radio. Nurse McCoy examined Mr. Boyett and treated him for a cut on the arm. He requested the staff on the next medical rounds to assess Mr. Boyett's injury, and he placed Mr. Boyett under medical observation for the dizziness Mr. Boyett claimed caused the fall. Nurse McCoy treated every apparent medical need of Mr. Boyett at the time he saw him. There is no evidence he delayed or denied medical treatment to Mr. Boyett.

*20 The plaintiff complains Nurse McCoy failed to appropriately assess the cause of Mr. Boyett's fall. However, even if Nurse McCoy negligently evaluated the cause of the fall, this would not suggest an Eighth Amendment violation.FN119 There is no evidence he had a "state of mind more blameworthy than negligence"FN120 or that this alleged omission substantially harmed Mr. Boyett.

As with the rest of the medical staff, Nurse McCoy had no reason to suspect and, therefore, disregard an excessive risk to Mr. Boyett's health or safety with regard to Mr. Boyett's other alleged conditions or complaints. Because no reasonable juror could find otherwise, the plaintiff's claims as to Nurse McCoy fail.

FN119.Perkins, 165 F.3d at 811.

FN120.Farmer, 511 U.S. at 835.

6. Defendant Dave Patt

Similarly, Sgt. Patt's actions reveal no deliberate indifference to Mr. Boyett's medical needs. In fact, there is no evidence in the record as to what, if any, direct contact Sgt. Patt had with Mr. Boyett. The plaintiff alleges Sgt. Patt was responsible for the continued protocol that resulted in Mr. Boyett allegedly being over-medicated with Thorazine. Even assuming this were the case, it does not show Sgt. Patt acted with deliberate indifference to Mr. Boyett's serious medical needs. The plaintiff also argues Sgt. Patt should face liability for his alleged statement that it would be "overkill" for medical staff to document every action they took.FN121However, the record does not show any connection between this statement and any inadequate medical care of Mr. Boyett, nor does it suggest Sgt. Patt failed to provide for Mr. Boyett's medical care in any other way. A reasonable juror could not find Sgt. Patt acted

with deliberate indifference to Mr. Boyett's medical needs.

FN121. Pl.'s Mem. in Opp'n to Officer Defs.' Mot. for Summ. J., Docket No. 148, Exh. 11, Smith Depo. 92.

7. Defendant Sabrina Steele

A reasonable juror also could not find PA Steele's actions reveal deliberate indifference to Mr. Boyett's medical needs. PA Steele practiced at the correctional facility under the license of Dr. Burnham, pursuant to Utah Code Ann. § 58-70a-101, et seq., and Utah Admin. Code R. 156-70a-101, et seq. The State of Utah granted PA Steele an exemption from the requirement that her supervisor work on-site because she practiced in a rural area. However, Dr. Burnham was available to address PA Steele's concerns twenty-four hours a day.

PA Steele's only contact with Mr. Boyett occurred September 1, 2003. On this date, PA Steele evaluated Mr. Boyett and requested he advise her of his medical history. Mr. Boyett indicated he suffered from alcohol withdrawal symptoms and was concerned about healing from his hernia surgery. PA Steele prescribed 500 mg of Naprosyn twice daily and 25 mg of Elavil twice daily for Mr. Boyett's neck and back pain. She prescribed 0.1 mg of Clonidine twice daily to treat his Methadone withdrawal. She ordered liver function

tests to be performed on Mr. Boyett and requested follow up as needed. She evaluated his physical state and determined he had healed well from his surgery. PA Steele also advised the jail medical staff to contact her if they had questions about any of the inmates, including Mr. Boyett. PA Steele appears to have acted reasonably in her evaluation of Mr. Boyett. There is no indication she acted negligently, let alone with deliberate indifference.

*21 There is also no evidence PA Steele possessed any knowledge of Mr. Boyett's other alleged injuries or conditions such that § 1983 liability would be proper. Mr. Boyett made no complaints and exhibited no symptoms to PA Steele which would alert her to other medical conditions. PA Steele would need reason to know of "underlying facts indicating a sufficiently substantial danger"FN122 in order to be aware of an actual danger. Without this awareness, PA Steele cannot have been deliberately indifferent to Mr. Boyett's untreated medical needs. Because the plaintiff has failed to produce evidence that any actions or omissions by PA Steele reflected deliberate indifference, the plaintiff's claim against PA Steele fails. Similarly, the plaintiff has failed to establish Sheriff Smith's liability under § 1983.

FN122.Farmer, 511 U.S. at 844.

IV. Claims Against Sheriff Smith-Failure to Properly Hire, Train, and Supervise; and Deficient Policies

The plaintiff contends Sheriff Smith is liable pursuant to § 1983 for failure to properly hire, train, and supervise his employees, and for maintaining deficient policies. The doctrine of respondeat superior may not be used to hold a police supervisor liable pursuant to § 1983 for misconduct of subordinate officers.FN123A finding of fault on the part of the supervisor is necessary for a finding of liability.FN124

FN123.See McClellan v. Facteau, 610 F.2d 693 (10th Cir.1979).

FN124.Serna v. Colo. Dep't of Corrs., 455 F.3d 1146, 1151 (10th Cir.2006).

[I]t is not enough for a plaintiff merely to show a defendant was in charge of other state actors who actually committed the violation. Instead, ... the plaintiff must establish a deliberate, intentional act by the supervisor to violate constitutional rights. In short, the supervisor must be personally involved in the constitutional violation and a sufficient causal connection must exist between the supervisor and the constitutional violation.FN125

FN125.Id. (citations and internal quotations omitted).

A finding of supervisor liability is premised on the plaintiff establishing, first, that the supervisor's subordinates violated the Constitution.FN126Next, the plaintiff must draw an affirmative link between the inferior officer's civil rights violation and the supervisor's acts or omissions.FN127 To create this link, the plaintiff must show the supervisor actively participated or acquiesced in the constitutional violations.FN128"[T]he supervisor's state of mind is a critical bridge between the conduct of a subordinate and his own behavior"-the supervisor must have acted with knowledge, or at least deliberate indifference, that a constitutional violation would occur.FN129Although it's somewhat difficult to glean from the sixty-six pages of facts in the plaintiff's motion, it appears the plaintiff is alleging Sheriff Smith should be held liable for the policies of the correctional facility, specifically:

FN126.Id.

FN127.See Rizzo v. Goode, 423 U.S. 362, 371 (1976).

FN128.Serna, 455 F.3d at 1151;Kite v. Kelley, 546 F.2d 334, 337 (10th Cir.1976).

FN129.Serna, 455 F.3d at 1151.

[t]he lack of proper records, the ignoring of the requirement of the need for prescriptions for Thorazine, the lack of evaluation of Boyett by a medical doctor after his alleged fall on September 3, 2003 when he exhibited symptoms of seizure, (and perhaps suffered fractured ribs and other injuries), the lack of evaluation of Boyett on September 5, 2003, when he received a head laceration that required stitches, the restraint by forcibly administered psychotropic drugs, the lack of medical attention, [and] the lack of supervision in the medical observation cell FN130

FN130. Pl.'s Mem. in Opp'n to Officer Defs.' Mot. for Summ. J., Docket No. 148, at viii.

*22 Whether these claims are based on failure to adequately supervise or train, or on maintenance of bad policies, the plaintiff has done nothing to establish the necessary deliberate act or affirmative link between Sheriff Smith and the alleged constitutional violations.

The plaintiff's claim against the sheriff fails at the outset because the plaintiff has not established any of Sheriff Smith's subordinates violated Mr. Boyett's constitutional rights. Without such a showing, the court cannot find Sheriff Smith was involved in any violation.FN131Even if the plaintiff had shown a subordinate officer violated Mr. Boyett's constitutional rights, it failed to show Sheriff Smith actively participated or acquiesced in any violation. Sheriff Smith confirmed that no

Washington County correctional facility policies had been breached relating to the custody or death of Mr. Boyett. Further, none of the policies have been shown to be facially unconstitutional or to be likely to lead to violations of rights.

FN131.See Serna, 455 F.3d at 1151.

A. Failure to Train-Policies and Employee Qualifications

With regard to failure to train, this case can be both compared to and distinguished from the Tenth Circuit's decision in McClelland v. Facteau.FN132 In Facteau, a number of police officers and correctional officers beat and injured an inmate who had been booked into jail for traffic violations.FN133The court rejected the plaintiff's claims that the perpetrators' police chiefs were directly liable due to breach of duties to train and supervise their subordinates.FN134Specifically, the court found a subordinate's act, contrary to policy, does not constitute sufficient causal connection to hold a supervisor liable because it does not establish proof of wrongful policy or lack of training.FN135"Supervisors cannot automatically be held liable for a subordinate straying from the established path."FN136Only if the plaintiff had provided evidence of defective training or procedures could he have prevailed on that claim.FN137

FN132.610 F.2d 693 (10th Cir.1979).

FN133.Id. at 695.

FN134.Id.

FN135.Id. at 695-96.

FN136.Id. at 697.

FN137.Id.

In this case, the plaintiff has failed to provide evidence of defective policies. Although the plaintiff has argued against the protocol allowing administration of Thorazine, it has not shown this approach to be objectively wrongful. Moreover, the plaintiff has made no showing Sheriff Smith's state of mind was sufficient for liability-the record does not support an inference that the sheriff acted with knowledge or deliberate indifference that a constitutional violation would result from the Thorazine policy.FN138 The plaintiff argues Sheriff Smith should face liability for the inadequate medical records the correctional staff allegedly kept, especially in light of Sgt. Patt's alleged statement that it would be "overkill" for medical staff to document every action they took.FN139This claim fails because Sheriff Smith had no knowledge of Sgt. Patt's alleged statement until after Mr. Boyett's death. Moreover, the plaintiff has failed to show that any deficient records led to any harm to Mr. Boyett or any other inmates. In absence of evidence the allegedly

deficient record-keeping caused harm, the plaintiff has failed to show a defective policy existed or that Sheriff Smith acted indifferently to it.

FN138.See Serna, 455 F.3d at 1151.

FN139. Pl.'s Mem. in Opp'n to Officer Defs.' Mot. for Summ. J., Docket No. 148, Exh. 11, Smith Depo. 92.

*23 Just as there is no evidence of defective policies, there is no evidence of specific training deficiencies. A lack of training claim fails without proof Sheriff Smith made a conscious decision to adopt a policy of not training or accepted a permanent and well-settled practice of not training.FN140 A single incident of failure to train is insufficient to establish an actionable claim of failure to train unless the incident is due to a facially unconstitutional policy.FN141For example, the two doses of Thorazine administered to Mr. Boyett within less than six hours, even if found to spring from a failure to train, would not be actionable under § 1983 because the plaintiff has presented no evidence it was based on a facially unconstitutional policy. The plaintiff has failed to show the corrections staff was improperly trained or to point to any lack of training resulting in a violation of Mr. Boyett's rights. The plaintiff focuses its claim of deficient training on PA Steele. However, the plaintiff fails to provide evidence to support this claim. PA Steele

graduated from Emery University and had been practicing as a medical professional since she graduated. Dr. Bruce Burnham supervised PA Steele at the correctional facility pursuant to a "rural exemption" granted by the State, and Dr. Burnham specifically approved of PA Steele's employment there. The record does not support an inference PA Steele's or any other correctional staff member's training or qualifications were anything but adequate.

FN140.Simmons v. City of Philadelphia, 947 F.2d 1042, 1059 (3d Cir.1991); see also Okla. City v. Tuttle, 471 U.S. 808, 823 (1985).

FN141.Tuttle, 471 U.S. at 823.

B. Failure to Supervise-Inadequate Medical Care and Excessive Force

The plaintiff has also failed to show Sheriff Smith should be held liable based on failure to supervise. In Facteau, the Tenth Circuit found that liability for failure to supervise or correct misconduct requires the defendant to be "adequately put on notice of the prior misbehavior."FN142Whether a police chief is adjudged to have notice is evaluated using the standard of a reasonable person under the circumstances.FN143The Facteau court found "[d]istant rumors that are too vague to prompt action by reasonable persons, or information that is reasonably believed to lack credibility do not provide sufficient notice."FN144However, due to

the various law suits pending against the cities and a police chief for previous inmate deaths, and due to the widespread news coverage of similar inmate abuse, the court remanded this claim.FN145The court surmised publicity of police misconduct may have been so widespread and credible that the police chief defendants may have known of the misconduct.FN146If the police chiefs did possess such knowledge, it is possible a trier of fact may find they should have and could have taken steps to prevent the plaintiff's rights from violation.FN147

FN142.Facteau, 610 F.2d at 697.

FN143.Id.

FN144.Id.

FN145.Id.

FN146.Id. at 698.

FN147.Id.

The facts of this case are a far cry from Facteau.The plaintiff has failed to show Sheriff Smith had sufficient notice of any misbehavior by corrections officials to be liable under § 1983 for failure to supervise. The plaintiff presents the court with multiple suppositions-claims that "if only" correctional staff had taken particular

actions, then Mr. Boyett would not have died. However, the record does not support an inference any one person could have taken any specified act to prevent his death, let alone that failure to do so was rooted in deliberate indifference sufficient to constitute a violation of Mr. Boyett's civil rights. Even if all the plaintiff's "if, then" contentions are meritorious, failure of correctional staff to take the plaintiff's suggested actions does not establish that Sheriff Smith had notice of such widespread abuse to subject him to § 1983 liability.

*24 With regard to medical care, there is no evidence jail personnel were deliberately indifferent to Mr. Boyett's needs. If anything, the record fully supports the opposite conclusion. In any event, Sheriff Smith had no reason to think Mr. Boyett's constitutional rights were violated and, indeed, they were not. Medical staff treated Mr. Boyett's dizziness and injuries he sustained from a fall. Nurse McKinnon recommended treatment for the constipation of which Mr. Boyett complained. Nurse Hanson treated Mr. Boyett's head laceration. A licensed clinical social worker treated him for psychotic behavior. Medical staff treated Mr. Boyett for disorientation. PA Steele prescribed substitutes for the Methadone Mr. Boyett had been taking for withdrawal. PA Steele examined Mr. Boyett to assess the healing of his prior abdominal surgery-she found him to be well-healed and found no indication of internal bleeding. PA Steele ordered liver function tests in response to Mr. Boyett's claims of a failing liver. The only injuries and conditions the medical staff

failed to treat are those of which Mr. Boyett never complained or exhibited symptoms. Considering that the jail staff lacked knowledge of Mr. Boyett's untreated medical conditions, it is unreasonable to infer Sheriff Smith had notice any conditions were untreated.

The plaintiff brings the court's attention to a letter Mr. Boyett's sister, Ms. Brady, sent to the Washington County Attorney's Office expressing concern about Mr. Boyett's medical care. However, the letter only warned of Mr. Boyett's need to stay on his prescribed medications; it did not inform the reader of any particular medical condition. The letter, therefore, did not put correctional staff or Sheriff Smith "on notice" of any of Mr. Boyett's undiagnosed conditions or injuries. Chief of Police Lambert forwarded Ms. Brady's letter to the correctional facility. In an e-mail to Chief Lambert on September 3, 2003, Nurse McCoy outlined the staff's medical care of Mr. Boyett to that point. The email explained Mr. Boyett had been given medication, attended to by PA Steele, and given numerous opportunities to see medical staff. If anything, this would convince a reasonable juror Sheriff Smith had reason to believe Mr. Boyett's medical needs were fully met. Especially in light of the fact that the plaintiff offered no evidence of any prior instances of inadequate medical care relating to other inmates, this does not constitute actionable failure to supervise.

The plaintiff's references to excessive force similarly fail. The plaintiff's contention that the

photographs of Mr. Boyett's body establish injuries occurring due to assault is unsupported. Dr. Lies indicated the discoloration on the body was due to lividy and to facial plethora which occurs with sudden cardiac death. The swelling around the eyes and scrotum resulted from gaseous expansion-a normal post-mortem decompositional change. Dr. Leis explained no underlying physical injuries would produce that effect. The court, therefore, cannot take the great inferential leap required to find that Sheriff Smith knew or should have known of excessive force perpetrated by his employees or by other inmates. The court cannot draw this inference based on prior excessive force episodes either-Sheriff Smith terminated a guard for the only known incident of excessive force by a deputy at the facility, and it was completely unrelated to Mr. Boyett. Unlike in Facteau, the plaintiff has failed to show widespread news coverage of inmate abuses at Purgatory Correctional Facility, or any other basis to impute knowledge to Sheriff Smith.

V. Claim Against Washington County-Municipal Liability

*25 The plaintiff appears to have taken a shotgun approach to its opposition to Washington County's motion for summary judgment, which makes its memorandum somewhat difficult to navigate. In essence, the plaintiff rests its argument on general allegations Washington County's policies deprived Mr. Boyett of his constitutional rights including, specifically, the county's alleged

opposition to summary judgment are those listed in its response to Washington County's statement of facts. In it, the plaintiff objects to Washington County's alleged policies of:

[1] administering prescription drugs; [2] of admitting inmates in need of medical care and treatment and not continuing their care; [3] of not allowing prescription drugs to be administered in the jail when the jail authorities did not know why the drugs were prescribed, what they were being used to treat, the nature of the aliment [sic] that required them to be prescribed, and the lack of review so that these questions could be answered and an alternative medication prescribed; [4] the failure to have a qualified medical staff; [5] the failure to have a medical doctor on staff or at the very least on call; [6] the failure to hire a qualified PA who operated under the license of a qualified medical doctor, not only in form but in substance, who was overseen on a day to day basis with proper and adequate review of the medical records and care; [7] of having part time medical assistance at a distance; [8] of having a policy of not preparing and providing accurate and organized medical records labeling it as "overkill"; [9] of hiring piecemeal temporary medical providers in order to cut costs and attempt to circumvent the constitutional protections required for the inmates; [10] the

FN148. Pl.'s Mem. in Opp'n to Washington County's Mot. for Summ. J., Docket No. 151, at iv-v.

It is unclear whether the plaintiff offers these allegations in support of its failure-to-train claim or its failure-to-provide-adequate-medical-care claim. The court, therefore, has evaluated the allegations where they best seem to fit. Additionally, although the plaintiff's memorandum in opposition to the defendants' motion for summary judgment includes fifty-three pages of factual allegations, nowhere does the plaintiff advise the court which facts are offered in support of which claims. After this litany of alleged "horribles" to which Mr. Boyett was supposedly subject, the plaintiff only devotes five pages to discussion, and the discussion largely consists of statements of law and legal conclusions. In all of this, the plaintiff presents no evidence an official custom, policy, or lack of training caused a violation of Mr. Boyett's civil rights.

*26 Parties may not use § 1983 suits to duplicate state tort law on a federal level.FN149Municipality liability is not established solely because an employee inflicts

constitutional injury on another .FN150To be liable, the governmental entity itself must be responsible for the injury through an act or edict that can fairly be said to represent official policy FN151-"[t]hat is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and deprivation of federal rights."FN152When a policy is lawful on its face, "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee."FN153Therefore, municipalities may only be held liable under § 1983 if the plaintiff establishes: (1) a municipal policy or custom existed, and (2) the policy or custom is directly and causally linked to the alleged injury.FN154If the challenged policy consists of failure to act, such as failure to train, the plaintiff must establish "deliberate indifference" to the rights of municipality inhabitants caused the municipality's inaction.FN155Also, in the absence of an underlying constitutional violation by a municipal official, the municipality may not be held liable.FN156

FN149.See Medina v. Denver, 960 F.2d 1493, 1495 (10th Cir.1992).

FN150.Monell v. New York City Dep't of Social Svcs., 436 U.S. 568, 694 (1978).

FN151.Id.

FN152.Board of County Comm'rs v. Brown, 520 U.S. 397, 404 (1997).

FN153.Id. at 405.

FN154.Canton v. Harris, 489 U.S. 378, 385 (1989).

FN155.Id. at 389.

FN156.Los Angeles v. Heller, 475 U.S. 796, 799 (1986); see also Apodaca v. Rio Arriba County Sheriff's Dep't, 905 F.2d 1445, 1447-48 (10th Cir.1990); Myers v. Okla. County Bd. of Comm'rs, 151 F.3d 1313, 1316 (10th Cir.1998).

A. Failure to Provide Adequate Medical Care

As discussed previously, deficient medical care may constitute a constitutional violation.FN157However. the plaintiff must meet both the objective and subjective components by showing the medical deprivation was "sufficiently serious." FN158 and the defendant acted with a mens rea on par with criminal recklessness.FN159At the outset, many of the plaintiff's claims fail because, as a matter of law, it has not presented evidence most of the challenged actions of Washington County constituted policies or customs sufficient to attach § 1983 liability.FN160Moreover, even if such

policies did exist, the plaintiff has not shown the policy or custom is directly and causally linked to medical care so deficient as to constitute a constitutional injury.FN161

FN157.Mata v. Saiz, 427 F.3d 745, 751 (10th Cir.2005).

FN158.Farmer, 511 U.S. at 834.

FN159.Id. at 836.

FN160.See Canton, 489 U.S. at 385.

FN161.See id.

1. Alleged Policies-Administration of Medication and Disallowance of Methadone

The plaintiff has flatly failed to identify official policies which might impose § 1983 liability. An official policy is one made by lawmakers or by those whose acts or edicts may fairly be said to represent official policy.FN162 The court first addresses the two courses of conduct that may qualify as unofficial policies-the administration of prescription drugs and the disallowance of Methadone use in the jail. The court believes this conduct corresponds to the plaintiff's alleged policies of "[1] administering prescription drugs" FN163 and

FN162.Monell, 436 U.S. at 694.

FN163. Pl.'s Mem. in Opp'n to Washington County's Mot. for Summ. J., Docket No. 151, at iv.

[3] of not allowing prescription drugs to be administered in the jail when the jail authorities did not know why the drugs were prescribed, what they were being used to treat, the nature of the aliment [sic] that required them to be prescribed, and the lack of review so that these questions could be answered and an alternative medication prescribed FN164

FN164.Id.

*27 Washington County jail officials' administration of medications to inmates may constitute an actual policy because the jail had medical personnel on staff specifically to provide this type of medical care. PA Steele is trained and licensed to give medication. She prescribed the Clonidine, Elavil, Haldol, and Napryson administered to Mr. Boyett. And although Ms. Steele did not prescribe the Thorazine, jail staff administered it pursuant to a physician's standing order or protocol. However, even if this establishes Washington County had a policy of administering medications, there was nothing unconstitutional about administering these medications to Mr. Boyett. Because inmates lack access to many outside resources, jails have a responsibility to provide inmates with medication,FN165 and

nothing indicates jail officials administered medication to Mr. Boyett without his consent or using force.

FN165.Farmer, 511 U.S. at 832.

The plaintiff seems to object the most to the administration of Thorazine to Mr. Boyett. The court has already determined administering Thorazine to Mr. Boyett did not violate his civil rights.FN166The plaintiff elevates its challenge to the Thorazine administration by pointing out jail staff recorded having given Mr. Boyett two 100 mg doses of Thorazine on September 5, 2003, each within less than six hours of the other. However, as discussed previously, any mistake in dosage constitutes medical negligence at most-there is no indication the participants had a criminally reckless mens rea.Further, in the autopsy of Mr. Boyrtt's body, Dr. Leis found no elevated levels of any medication, including Thorazine.

FN166.See Order Granting Washington County Defs.' Mots. for Summ. J., Docket No. 120, at 11 (Apr. 26, 2006).

Washington County also arguably had a policy of disallowing Methadone use in the jail. PA Steele referred to a protocol disallowing narcotics, and Methadone is a narcotic. PA Steele described the concerns with allowing such narcotics in the jail: "the patient would be beaten or abused by other inmates in order to get that

methadone."FN167She explained inmates will even force others to vomit Methadone pills given by medical personnel. According to PA Steele, individuals do not die solely because they do not receive their prescribed Methadone. Also, Washington County did not leave Mr. Boyett without recourse; as substitutes for Methadone, PA Steele prescribed Elavil and Napryson. There is no evidence negating the appropriateness of prescribing substitute medications to mimic Methadone's effect on the body. Even if PA Steele had not prescribed these alternatives, Nurse Hanson clarified that at the low levels of Methadone Mr. Boyett was receiving, withdrawal was not a major concern. In this case, the court finds Mr. Boyett had no constitutional right to Methadone treatment. Other courts have reached similar conclusions.FN168 Even if the court had found Methadone treatment to constitute a constitutional right, the plaintiff has failed to establish Washington County personnel acted with deliberate indifference to this right; a necessary finding for a constitutional violation based on deficient medical care. Instead, PA Steele took special care to address Mr. Boyett's Methadone treatment issues.

FN167. Pl.'s Mem. in Opp'n to Defs.' Mot. for Summ. J., Docket No. 148, Exh. 5, at 96.

FN168.See, e.g., Holly v. Rapone, 476 F.Supp. 226, 230 (E.D.Pa.1979).

2. Alleged Medical Customs

*28 With regard to the remainder of the plaintiff's medical-based allegations, the plaintiff provides no evidence jail officials' actions stemmed from jail or county policies. For example, nowhere in the record did the plaintiff present evidence of a Washington County policy mandating employees to discontinue needed medical care. The only way Washington County may be liable in absence of official policy is if its employees' actions reflect customs or decisions sufficient to bring Washington County under the reach of § 1983. The court, therefore, assumes the plaintiff bases the remainder of its claims on the existence of customs. A custom is something that lacks formal approval, but constitutes such a permanent, well-settled, and widespread practice so as to have the force of law.FN169

FN169.Monell, 436 U.S. at 691;Marshall v. Columbia Lea Reg'l Hosp., 345 F.3d 1157, 1177 (10th Cir.2003).

The plaintiff accuses Washington County "of admitting inmates in need of medical care and treatment and not continuing their care."FN170There is no evidence this was a sufficiently widespread practice to constitute a custom. In fact, there is no evidence Washington County discontinued necessary medical care of any inmates, including Mr. Boyett. Before booking Mr. Boyett in jail on August 20, 2003, the

arresting officer took him to Dr. Tremea, a physician who medically cleared him for incarceration. Dr. Tremea diagnosed Mr. Boyett with recent abdominal surgery and alcohol intoxication, and his only recommendation for follow-up treatment was that Mr. Boyett continue Methadone treatment and be observed for withdrawal symptoms. The plaintiff complained police officials did not have Mr. Boyett medically cleared before incarcerating him again on August 27, 2003, but the plaintiff points to no reason police officials should have sought such clearance. Mr. Boyett himself indicated his medical history was the same on August 27, as when he was booked on August 20. There is no indication he was admitted to jail while in need of medical care. A reasonable juror would not expect corrections officials to diagnose medical needs a physician failed to recognize, especially when the inmate himself was silent as to any needs. Other than the discontinuation of Methadone treatment addressed above, the record evidence does not support an inference Washington County failed to continue any medical treatment begun before Mr. Boyett's incarceration.

FN170. Pl.'s Mem. in Opp'n to Washington County's Mot. for Summ. J., Docket No. 151, at iv.

The plaintiff has presented evidence some doses of the medications PA Steele prescribed for Mr. Boyett while in jail were not recorded as being administered. However, the plaintiff fails to establish neglecting to administer prescribed

medications was sufficiently widespread to constitute a custom. And even assuming it was a custom, evidence of deliberate indifference to serious medical needs is required to establish a § 1983 claim for inadequate medical care. Assuming Mr. Boyett was denied these unrecorded doses of medication, the plaintiff has not presented medical evidence these omissions were based in deliberate indifference such that they constituted a violation of Mr. Boyett's due process rights. The evidence also fails to support an inference that missing a few doses of medication constituted the denial of a serious medical need.

*29 Moreover, the evidence fails to support an inference jail officials failed to treat any complaints or medical conditions of which they were aware. In fact, jail officials appear to have taken particular care to address any complaints of which they had knowledge. After Mr. Boyett fell on September 3, 2003, he complained of dizziness. Nurse McCoy treated Mr. Boyett for this complaint. He also treated the laceration on Mr. Boyett's forearm, sustained as a result of his fall. Mr. Boyett complained of constipation, so Nurse McKinnon evaluated Mr. Boyett and recommended a course of treatment. Mr. Boyett sustained a laceration to his head on September 5, 2006. Nurse Hanson evaluated the injury and treated it. When Mr. Boyett became disoriented and seemed to have some mental difficulties, Mr. Wolton, a licensed clinical social worker, evaluated Mr. Boyett; he looked at the possibility of a pyschotic episode and assessed the risk of

danger Mr. Boyett posed to himself. Based on the assessment of Mr. Boyett's risk of self-harm, the jail staff administered Thorazine to Mr. Boyett. The staff also transferred Mr. Boyett to a medical observation cell, where he could be constantly observed. Mr. Boyett was evaluated for his withdrawal symptoms and was given medication to treat them. PA Steele also prescribed substitute medications for the Methadone Mr. Boyett had been taking. At one point, Mr. Boyett claimed to be internally bleeding due to hernia surgery. PA Steele examined him, finding Mr. Boyett had recovered from his surgery and finding no indication of internal bleeding. Additionally, Mr. Boyett claimed he had a bad liver. PA Steele examined him and ordered liver function tests to be done. It is clear Washington County did not repeatedly ignore the plaintiff's requests; instead, Mr. Boyett was seen by medical personnel on numerous occasions in relation to complaints. It is difficult to distill a policy or custom of refusing medical treatment to Mr. Boyett where Washington County never refused to treat problems of which they were aware.

If, with its allegation Washington County failed to provide needed continuing care, the plaintiff is arguing Washington County is subject to § 1983 liability for failing to treat medical conditions of which jail officials were unaware, the plaintiff's claim still fails. The court cannot find a policy or custom of refusing to provide medical care where Mr. Boyett never requested it and Washington County was unaware of the need. And even if this

custom existed, it is not enough to allege Washington County should have known of Mr. Boyett's injuries; the plaintiff failed to show jail officials were both "aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists," and actually drew the inference.FN171The record does not establish Mr. Boyett ever complained of problems or exhibited symptoms from which an inference could be drawn that he suffered from untreated serious medical needs. And, the plaintiff has not provided evidence jail officials actually drew inferences Mr. Boyett suffered such ailments. To the extent the plaintiff argues against Washington County's failure to diagnose these injuries or to refer Mr. Boyett to a medical doctor even though they lacked knowledge of these conditions, its claims also fail.

FN171.Farmer, 511 U.S. at 837.

*30 [T]he question whether an X-ray-or additional diagnostic techniques or forms of treatment-is indicated is a classic example of a matter of medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice, and as such the proper forum is the state court FN172

FN172.Estelle, 429 U.S. at 107.

The plaintiff has not shown the jail officials' treatment modalities violated Mr. Boyett's constitutional rights. Instead, the plaintiff's claims sound in negligence-a standard that does not give rise to municipal § 1983 liability. For example, the plaintiff cites "reasonable medical standards of care" and alleges employees of Washington County violated those standards.FN173 From the plaintiff's own description of events, it is clear Mr. Boyett received extensive medical care and jail officials were not indifferent to his needs. Mr. Boyett's exact cause of death constitutes a disputed fact but it is immaterial in the sense that regardless of the cause of death, the plaintiff has failed to demonstrate the propriety of attaching § 1983 liability to Washington County. As discussed with regard to Sheriff Smith, even if all the plaintiff's "if only" claims were meritorious, failure of correctional staff to follow the plaintiff's recommended courses of action does not constitute a civil rights violation-there is simply no evidence any defendants drew inferences that Mr. Boyett suffered from untreated serious medical conditions. Therefore, the plaintiff's claim Washington County maintained unconstitutional customs of not treating medical needs does not survive summary judgment.

FN173.See, e.g., Pl.'s Mem. in Opp'n to Washington County's Mot. for Summ. J., Docket No. 151, at xxvi.

B. Failure to Properly Train or Hire, and Other Challenged Policies

Although the plaintiff alleges Washington County generally failed to train its employees and hired unqualified individuals, there is no evidence of any acts or omissions of constitutional proportion with regard to hiring or training or with regard to Washington County's other non-medical policies.

1. Failure to Train

As with failure to provide adequate medical care, Washington County may only be held liable under § 1983 for providing inadequate training or failing to train if: (1) a municipal policy or custom existed, and (2) the policy or custom is directly and causally linked to the alleged constitutional injury.FN174"A supervisor or municipality may be held liable where there is essentially a complete failure to train, or training that is so reckless or grossly negligent that future misconduct is almost inevitable."FN175To be a policy or custom actionable under § 1983, this failure to train must evidence deliberate indifference to the rights of the municipalities' inhabitants FN176-"i.e., the failure to train must reflect[ ] a deliberate or conscious choice by a municipality."FN177

FN174.Canton, 489 U.S. at 385.

FN175.Meade v. Grubbs, 841 F.2d 1512, 1527 (10th Cir.1988) (citation omitted).

FN176.Pembaur v. Cincinnati, 475 U.S. 469, 483-84 (1986); Canton, 489 U.S. at 387.

FN177.Barney v. Pulsipher, 143 F.3d 1299, 1307 (10th Cir.1998) (citation and internal quotations omitted).

The plaintiff can establish deliberate indifference by presenting evidence Washington County had "actual or constructive notice that its action or failure to act [was] substantially certain to result in a constitutional violation, and it consciously or deliberately [chose] to disregard the risk of harm."FN178This notice may be "established by proving the existence of a pattern of tortious conduct."FN179In a " 'narrow range of circumstances,' however, deliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a 'highly predictable' or 'plainly obvious' consequence of a municipality's action or inaction."FN180

FN178.Id. (citing Brown, 520 U.S. at 407).

FN179.Id.

FN180.Id. at 1308 (citing Brown, 520 U.S. at 409;Canton, 489 U.S. at 390 & n. 10)).

*31 Even identified deficiencies in a training program "must be closely related to the ultimate injury."FN181The court must assess whether the injury would have been avoided if the employee were trained in a program not deficient in the identified respect.FN182Also, "[c]ulpability requires a strong connection between the background of the particular applicant and the specific constitutional violation alleged."FN183

FN181.Canton, 489 U.S. at 391.

FN182.Id.

FN183.Barney, 143 F.3d at 1308.

That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program. Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. And plainly, adequately trained officers make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.FN184

FN184.Canton, 489 U.S. at 391.

In this case, the plaintiff incorporates an allegation of failure to train: "[12] along with the facts setting forth the acts and omissions of hiring, training and supervision ...." FN185 However, other than the plaintiff's allegation "[8] of [Washington County] having a policy of not preparing and providing accurate and organized medical records labeling it as 'overkill,' " FN186 the plaintiff has not identified any specific deficiencies in Washington County's training program. The plaintiff's claim with regard to this single, identified deficiency fails as there is no evidence Washington County had a policy or practice of maintaining disorganized or false medical records or that any problems had previously occurred alerting Washington County to any inadequacies in its record-keeping. And there is no evidence establishing what, if anything, jail officials failed to document in Mr. Boyett's medical records, or how any alleged failure to document harmed Mr. Boyett, much less resulted in a violation of his civil rights. Further, there is no evidence anyone in a policymaking position was aware of any record-keeping problems prior to Mr. Boyett's death.

FN185. Pl.'s Mem. in Opp'n to Washington County's Mot. for Summ. J., Docket No. 151, at v.

FN186.Canton, 489 U.S. at 391.

Without identified deficiencies, it is impossible for the court to determine the degree of connection

between the deficiencies and the injury.FN187The record does not support an inference any employees lacked the necessary qualifications, experience, or instruction to do their jobs; nor does it support an inference Washington County failed to hold training meetings or continuing education. Further, there is no indication jail employees failed to discuss emerging issues with each other or lacked familiarity with necessary policies. While the plaintiff obviously disagrees with the actions jail officials took and choices they made, such disagreement does not constitute an identified deficiency in training.

FN187.See id.

Moreover, the plaintiff has failed to establish a pattern of tortious conduct sufficient to support a finding of deliberate indifference. Instead, the plaintiff seems to imply that the very fact of Mr. Boyett's death necessarily suggests jail officials were inadequately trained. However, even assuming jail officials erred in their treatment of Mr. Boyett, "officers who are well trained are not free from error."FN188The court cannot infer inadequacy of training solely from mistakes jail officials allegedly made. Additionally, this case does not fall within the narrow range of circumstances justifying a finding of deliberate indifference absent a pattern of constitutional violations. Put simply, the plaintiff has not shown a violation of constitutional rights was a highly predictable or obvious result of any acts or omissions in training by Washington County.

FN188.Id.

*32 For these reasons, the court finds the plaintiff has not sustained its burden of showing Washington County's training to be constitutionally inadequate.

2. Inadequate Hiring

Municipality liability pursuant to § 1983 in the hiring context requires the court to find "this officer was highly likely to inflict the particular injury suffered by the plaintiff." Showing only a municipal officer scrutinized an applicant with less than sufficient care will not meet the "rigorous requirements of 'deliberate indifference.' " FN189

FN189.Barney, 143 F.3d at 1308 (citing Brown, 520 U.S. at 412).

The plaintiff challenges Washington County's "policies" of

[4] the failure to have a qualified medical staff; [5] the failure to have a medical doctor on staff or at the very least on call; [6] the failure to hire a qualified PA who operated under the license of a qualified medical doctor, not only in form but in substance, who was overseen on a day to day basis with proper and adequate review of the medical

records and care; [7] of having part time medical assistance at a distance ... [9] of hiring piecemeal temporary medical providers in order to cut costs and attempt to circumvent the constitutional protections required for the inmates FN190

FN190. Pl.'s Mem. in Opp'n to Washington County's Mot. for Summ. J., Docket No. 151, at v.

The court believes these alleged failures best fit an inadequate hiring claim. But the evidence in the record fails to support an inference Washington County's hiring was so inadequate § 1983 liability should attach.

The plaintiff presented no evidence Washington County hired any unqualified individuals. Each member of the jail's medical staff was licensed in accordance with state law, which means each individual complied with training, educational, and other requirements to practice in their professions.FN191 In particular, no evidence suggests PA Steele was unqualified for her job. A reasonable factfinder cannot say it was unreasonable for Washington County to rely on the training and experience of a state-licensed physician's assistant working under the license of a medical doctor who was available to answer her calls twenty-four hours a day. It was similarly reasonable for Washington County to rely on the rest of its state-licensed medical staff. The plaintiff has failed to establish that a medical doctor is required to be on staff at jails or that

failure to hire an on-staff doctor constituted deliberate indifference.

FN191.SeeUtah Code Ann. §§ 58-31b-101, et seq. (Nurse Practice Act); id. §§ 58-60-201, et seq. (Social Workers' Licensing Act); id. §§ 58-70-101, et seq. (Physician Assistant Act).

There is also no indication it is a legal requirement for a physician or physician's assistant be on-staff at correctional facilities. And Washington County's correctional facility did maintain a medical staff on-site consisting of Sergeant Patt, Nurse Hanson, Nurse McCoy, Nurse McKinnon, Nurse Hummer, and LCSW Worlton. PA Steele supplemented this on-site medical staff with weekly visits. Further, PA Steele was on-call to address any of the medical staff's questions or concerns regarding inmate treatment. The allegations Washington County hired piecemeal temporary medical providers to cut costs and circumvent constitutional protections are unsupported. The plaintiff has not shown deliberate indifference by Washington County as it pertains to hiring.

3. Other Challenged Policies

*33 The plaintiff's remaining claims fail to rise to the level of actionable § 1983 violations also. The plaintiff alleges a policy of not allowing visitors for pretrial detainees constituted a violation of Mr. Boyett's constitutional rights. However, the right

to prison visitors is not a constitutional right.FN192Rather, jail officials have reasonable discretion over jail visitation privileges.FN193Also, it is inaccurate to say Washington County espoused a policy of disallowing jail visitors. The policy required potential visitors to undergo background checks. This policy may delay visitation for a few weeks for some potential visitors, but the time frame is often shorter. The plaintiff has not established this policy was unreasonable or caused constitutional injury to Mr. Boyett.

FN192.See N.E. W. v. Kennard, 952 F.Supp. 714, 719 (D.Utah 1997).

FN193.Id.

The plaintiff also objects to Washington County's alleged policy of issuing "no-bail" warrants. However, there is no indication such a policy would be unconstitutional. And, Washington County had no such policy; the District Court issued the no-bail warrant in Mr. Boyett's case. Judge James L Shumate issued an arrest warrant for Mr. Boyett due to charges of driving under the influence, driving without insurance, driving on a suspended license, and failing to register his vehicle. Judge Eric Ludlow issued an arrest warrant for Mr. Boyett due to similar violations arising from a different incident. There is no evidence Washington County employees were meaningfully involved in the issuance process or

possessed control or influence over the type of warrants the judges issued. Finally, there is no evidence the issuance of no-bail warrants violated Mr. Boyett's constitutional rights. For these reasons, the court grants the defendants' motions for summary judgment.

VI. Motion to Correct Mistake

Upon review, the court denies Plaintiffs' Motion to Correct Mistake. In its motion, the plaintiff argues the court intended to wait until the close of expert discovery before ruling on Mr. Keil and Mr. Worlton's motions for summary judgment. However, this argument does not accurately reflect the court's intent. At the hearing, in response to a query as to whether the two summary judgment motions would be held under advisement until the close of expert discovery, the court said: "I'll take them under advisement until I've decided that I have sufficient information to rule."FN194

FN194. Mot. for Summ. J. Hr'g Tr. 28, Mar. 30, 2006, Docket No. 126.

This is exactly what occurred-only after review of Roger Clark's expert report, submitted on March 31, 2006, did the court grant summary judgment to Mr. Keil and Mr. Worlton. Nothing in the report changed the court's opinion that a grant of summary judgment was appropriate. Later, after the completion of expert discovery, the court again

reviewed its prior ruling with regard to Mr. Keil and Mr. Worlton. The court continues to feel confident in the propriety of its prior order-the evidence on the record shows this ruling to be correct. The court, therefore, denies Plaintiffs' Motion to Correct Mistake.

CONCLUSION

*34 Based on the foregoing, the court GRANTS the defendants' motions for summary judgment [# 135, # 133, # 141]. Further, the court DENIES the plaintiff's Motion to Correct Mistake [# 127] and finds the plaintiff's motion for a hearing on that issue to be MOOT [# 129]. The court finds the challenges to expert testimony to be valid with regard to Dr. William Keith Lara, Dr. Eugene Strayhorn, Dr. Frederick Lovell, and Joseph Kasperick. The court, therefore, GRANTS the defendants' motions with regard to these experts [# 176, # 174, # 165]. Additionally, the court GRANTS the defendants' motion to strike the testimony of Dr. Wallace Graham, in part [# 163], but DENIES the plaintiff's motion to strike the testimony of Dr. Edward Lie[illegible] # 168]. Based on the outcome of this order, the motions to strike the testimony of Roger Clark and Rudy Riet are MOOT [# 170, # 172]. The clerk's office is directed to close the case.

Dated this 28th day of November, 2006.

BY THE COURT:

/s/ Paul G. Cassell
Paul G. Cassell
United States District Judge

United States District Court
Central Division for the District of Utah
FILED 2007 JAN 25 P 4:51

Sandra Boyett, et. al.

v.

County of Washington, et. al.

Case No. 2:04 cv 1173 PGC

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment be entered in favor of the defendants and plaintiffs' cause of action is dismissed with prejudice.

January 25, 2007

/s/ Louise S. York
Louise S. York
Acting Clerk

United States Court of Appeals,Tenth Circuit.

Sandra BOYETT, individually and as personal representative for the Estate of Raymond Boyett; Jessica (Boyett) Peterson; and Brandy (Boyett) Sorenson, Plaintiffs-Appellants,

v.

COUNTY OF WASHINGTON, a political subdivision of the State of Utah; Washington County Purgatory Correctional Facility, a political subdivision of the State of Utah; Washington County Sheriff, a political subdivision of the State of Utah; Kirk Smith, Sheriff of Washington County, individually and officially; Rob Tersigni, Chief Deputy Sheriff of Washington County, individually and officially; Fred Keil, Correctional Officer, individually and officially; Ray Kounalis, Correctional Officer, individually and officially; Gene Redford, Correctional Officer, individually and and officially; James Hanson, Nurse, individually and officially; Destiny Hummer, Nurse, individually and officially; Darryl McCoy, Nurse, individually and officially; Randy McKinnon, Nurse, individually and officially; Dave Patt, Nurse, individually and officially; Sabrina Steel, Nurse, individually and officially; Jon Worlton, Clinical Social Worker, Nurse, individually and officially, Defendants-Appellees.

No. 06-4315.

June 19, 2008.

Shandor S. Badaruddin, Missoula, MT, Edward P. Moriarity, Salt Lake City, UT, for Plaintiffs-Appellants.

Michele Mitchell, Washington County Attorneys Office, St. George, UT, Jesse C. Trentadue, Suitter & Axland, Salt Lake City, UT, for Defendants-Appellees.

Before HENRY, Chief Judge, EBEL, and TYMKOVICH, Circuit Judges.

ORDER AND JUDGMENT*

TIMOTHY M. TYMKOVICH, Circuit Judge.

*1 Raymond Boyett died in Washington County, Utah's Purgatory Correctional Facility a week after being arrested for failing to appear in court for traffic offenses. Before his death, Boyett suffered from-and was treated for-a variety of physical and mental ailments including alcoholism, liver disease, anxiety, and depression. The instant appeal stems from a lawsuit filed by Boyett's surviving family members under 42 U.S.C. § 1983 alleging prison officials caused or contributed to Boyett's death by (1) failing to timely treat injuries, (2) withholding medications and forcibly injecting antipsychotic drugs, and (3) allowing him to be assaulted by unknown guards or medical personnel.

The district court granted summary judgment to all individual Defendants on the basis of qualified immunity. The court also granted summary judgment to Defendant Washington County on the claim of municipal liability. We agree with the district court's decisions, concluding the Boyett family has failed to demonstrate a genuine issue of material fact about whether Defendants were deliberately indifferent to Boyett's serious medical needs, inflicted excessive force, or otherwise violated his federal rights. We also affirm the district court's decision to decline supplemental jurisdiction over the Boyett family's state law claims.

Exercising jurisdiction under 28 U.S.C. § 1291, we therefore affirm.

I. Background

A. Factual Background

Boyett died in his cell at the Purgatory Correctional Facility around 5:10 a.m. on September 6, 2003. He had been detained in the facility since August 27. While there, Boyett, age 54, was treated by nurses, a social worker, and a physician's assistant for various physical and mental ailments. After Boyett's death, Dr. Leis, the Utah state medical examiner, performed an autopsy. Dr. Leis concluded the cause of death

was occlusive coronary artery disease, with cirrhosis serving as a contributing factor.

Boyett's incarceration at the Purgatory Correctional Facility on August 27 was his second in the span of a week. On August 20, he had been booked into the facility for a DUI. Prior to booking, a doctor at the Dixie Regional Medical Center (DRMC) examined Boyett and concluded he was healthy enough for jail. The doctor listed alcohol intoxication and recent hernia surgery under "Diagnosis," and recommended Boyett continue his regular dose of the prescription drug Methadone. After spending one day in jail, Boyett was released.

On August 27, Boyett returned to the correctional facility after being picked up on an arrest warrant. Boyett's medical history chart at the facility contained the information supplied by the doctor at the DRMC pertaining to the recent surgery and the Methadone. The chart also indicated Boyett suffered from dental problems, tendon problems, liver disease, hepatitis C, anxiety, and depression. Boyett had also previously broken his neck and continued to live with broken vertebrae. On August 27, Boyett was taking the prescription drugs Celexa, Xanax, and Methadone.

*2 On August 31, four days into his detention, Boyett's health began to deteriorate. Boyett told Correctional Officer Pitcher he was internally

bleeding and going comatose. Pitcher alerted Nurse McKinnon who, along with fellow nurse Hanson, examined Boyett. They determined he was not internally bleeding or lapsing into a coma.

The next day, Physician's Assistant Steele further examined Boyett and took a verbal medical history from him to update the facility's files. Steele and Boyett discussed his recent hernia surgery, his five fractured neck vertebrae, and his alcohol withdrawal and Methadone treatment. After conducting a physical exam of Boyett, Steele concluded his hernia repair had healed. Steele prescribed 500 mg of Naprosyn and 25 mg of Elavil for Boyett's neck and back pain, as well as 0.1 mg of Clonidine to replace his prescription Methadone since Methadone was not allowed in Utah jails.

A day later, on September 2, Boyett again asked to see medical personnel. Boyett told Nurse Hummer he was going to die because of his liver disease. Hummer noted that Boyett had recently seen a doctor and was taking prescribed medications; there was nothing further she thought she could do.

On September 3, Boyett complained to Purgatory staff about his liver, hepatitis, insomnia, and general health. Officer Jessop and his supervisor concluded that because no nurses were then on duty, they could only make a log entry of the incident. Later that same day, Boyett injured

himself in a fall down a flight of stairs. Officer Keil was first on the scene and did not notice any bleeding or other obvious injuries. Nurse McCoy also responded and treated Boyett for a small cut on his arm. Boyett was transferred to a medical observation cell, where he could receive more attention from the nursing staff. McCoy stated Boyett fell as a result of becoming dizzy. This could have resulted from Boyett taking more than his prescribed dose of Clonidine. Medical logs show that at 11:58 p.m., Boyett told officers he had fallen for a second time. But when Nurse Hanson responded, he determined Boyett had not fallen; Boyett simply wanted someone to check on him.

The next day, Boyett submitted an inmate request form seeking a liver transplant from his mother.FN1Boyett was also observed banging his head against the door of his cell during the swing shift (3:00 p.m.-11:00 p.m.). Because of these disturbing actions, Nurse Hanson injected Boyett with 100 mg of Thorazine, an antipsychotic. Hanson determined Boyett was a danger to himself and would be calmed by the injection.

On September 5, Officer Redford checked on Boyett in his medical observation cell. Redford determined Boyett's mental condition was deteriorating and notified the facility's licensed clinical social worker, Jon Worlton. Worlton reviewed Boyett's medical history, interviewed Boyett, and spoke with Boyett's wife on the telephone. Worlton determined Boyett was

psychotic and should be given additional injections of Thorazine. A few hours later, when Officer Kounalis noticed a bloody spot on the back of Boyett's head, he and Officer Redford took Boyett to the infirmary for medical treatment.

*3 Nurse Hanson determined Boyett's head laceration was not serious and washed the wound with clean water. After consultation with Worlton, Hanson also injected Boyett with a second 100 mg of Thorazine to prevent Boyett from harming himself. At 7:45 p.m., Nurse Hummer injected Boyett with a third dose of Thorazine. Staffers then transported Boyett to a suicide watch cell in the booking area of the facility, leaving only a suicide gown and a mattress in the cell.

Early the next morning, at approximately 5:10 a.m., Officer Vernon noticed Boyett lying on the floor and not moving. The officer opened the cell and found Boyett was dead.

Dr. Leis, Utah's Deputy Chief Medical Examiner, conducted an autopsy on Boyett's body 24 hours later. Boyett's left anterior descending coronary artery was 90% occluded. Dr. Leis concluded the cause of death was occlusive coronary artery disease, with cirrhosis contributing significantly to death. The autopsy report also found Boyett's drug and medication levels were within normal limits.

Also shortly after Boyett's death, Washington County Sheriff Kirk Smith began an investigation into the circumstances surrounding the death. FBI agents provided additional assistance. It is not clear from the record, however, what additional information-if any-the investigation revealed.

B. Procedural History

The Boyett family brought several causes of action against Washington County and county employees who came into contact with Boyett during his incarceration. Plaintiffs sought damages for federal civil rights violations and state law torts Defendants allegedly committed before and after Boyett's death. The principal claims were that jail officials failed to provide adequate medical care, used excessive force, and operated under defective supervisory policies.

In this appeal, the Boyett family challenges: (1) the district court's grant of summary judgment to individual Defendants on the basis of qualified immunity; (2) the district court's grant of summary judgment on municipal liability; and (3) the district court's dismissal of the state law claims.

II. Qualified Immunity

A. Standard of Review

The district court granted qualified immunity to Defendants on the Boyett family's claims of deliberate indifference to medical needs, excessive force, and supervisory liability. We review the grant of qualified immunity de novo. See, e.g., Serna v. Colo. Dep't of Corrs., 455 F.3d 1146, 1150 (10th Cir.2006).

Officials granted qualified immunity have immunity from suit and from the concomitant burdens of litigation. See Saucier v. Katz, 533 U.S. 194, 200-01, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). To overcome a grant of qualified immunity, plaintiffs must satisfy a heavy two-part burden by showing: (1) "the defendant's actions violated a constitutional or statutory right" and (2) "the right was clearly established at the time of the defendant's unlawful conduct."Serna, 455 F.3d at 1150 (quoting Medina v. Cram, 252 F.3d 1124, 1128 (10th Cir.2001)). Plaintiffs must "go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to [their] case."Sealock v. Colorado, 218 F.3d 1205, 1209 (10th Cir.2000).

*4 The threshold inquiry in every qualified immunity case is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer[s'] conduct violated a constitutional right?" Saucier, 533 U.S. at 201, 121 S.Ct. 2151;see also Williams v. Berney, 519 F.3d 1216, 1220 (10th Cir.2008) ("Only if the plaintiff can show a constitutional violation do the

courts ask whether the constitutional right was clearly established."(quotation omitted)). If no constitutional right has been violated, our inquiry necessarily ends.

B. Deliberate Indifference to Serious Medical Needs

1. Legal Framework

The Eighth Amendment provides prisoners the right to be free from cruel and unusual punishments. This right is violated if prison officials show "deliberate indifference to an inmate's serious medical needs."Mata v. Saiz, 427 F.3d 745, 751 (10th Cir.2005). A prison official does not violate this standard, however, "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."Self v. Crum, 439 F.3d 1227, 1231 (10th Cir.2006) (quoting Farmer v. Brennan, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)). Thus, to make out a constitutional deprivation under the deliberate indifference standard, plaintiffs must prove two elements: (1) objectively, the inmate's medical needs were "sufficiently serious," and (2) subjectively, the prison official acted with a "sufficiently culpable state of mind." Id. at 1230-31;see also Mata, 427 F.3d at 751.

A medical need is sufficiently serious if it "has been diagnosed by a physician as mandating treatment or ... is so obvious that even a lay person would easily recognize the necessity for a doctor's attention."Sealock, 218 F.3d at 1209 (quoting Hunt v. Uphoff, 199 F.3d 1220, 1224 (10th Cir.1999)). A prison official has a sufficiently culpable state of mind if the official "knows of and disregards an excessive risk to inmate health or safety."Farmer, 511 U.S. at 837, 114 S.Ct. 1970;see also Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (concluding "a complaint that a physician has been negligent in diagnosing or treating a medical condition" does not show deliberate indifference).

In cases involving allegations of missed diagnoses or delayed treatment, plaintiffs may establish liability by showing:

(1) a medical professional recognizes an inability to treat the patient due to the seriousness of the condition and his corresponding lack of expertise but nevertheless declines or unnecessarily delays referral, e.g., a family doctor knows that the patient needs delicate hand surgery requiring a specialist but instead of issuing the referral performs the operation himself; (2) a medical professional fails to treat a medical condition so obvious that even a layman would recognize the condition, e.g., a gangrenous hand or a serious laceration; [or] (3) a medical professional completely denies care although presented with recognizable symptoms which potentially create a

medical emergency, e.g., a patient complains of chest pains and the prison official, knowing that medical protocol requires referral or minimal diagnostic testing to confirm the symptoms, sends the inmate back to his cell.

*5 Self, 439 F.3d at 1232 (citations omitted).

With these principles in mind, we turn to Plaintiffs' allegations of deliberate indifference.

2. Application

Plaintiffs claim the officer and nurse Defendants were deliberately indifferent to Boyett's serious medical needs during his time in the Purgatory facility. They point to a plethora of acts and omissions by Defendants: (a) failure to supply a qualified medical provider; (b) failure to provide the medicine and care prescribed by Boyett's treating physicians prior to incarceration; (c) failure to respond to symptoms and complaints regarding internal bleeding; (d) failure to respond to falls and seizures on September 3; (e) failure to treat Boyett's head laceration; (f) improper injection of antipsychotic medication; and (g) failure to prevent Boyett's death.FN2

We address the claims in order.

a. Failure to supply a qualified medical provider

[1] Plaintiffs have not shown how any individual officer or nurse failed to supply a qualified medical provider to Boyett. As a preliminary matter, there is no per se requirement that a jail provide its inmates around-the-clock access to a medical doctor. While jailers are ultimately responsible for their inmates' medical needs, Farmer v. Brennan, 511 U.S. at 833-34, 114 S.Ct. 1970, they can provide that care in a variety of ways, including access to trained personnel such as guards in the first instance, nurses, and physicians' assistants. The Eighth Amendment requires nothing more as a general matter. See, e.g., Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir.1982) (en banc) (reversing lower court's order that a penitentiary must hire two medical doctors to meet minimum standards of prison medical care under the Eighth Amendment); McCord v. Maggio, 910 F.2d 1248, 1250 (5th Cir.1990) (noting state prison officials retain "wide discretion in the operation of prison facilities"). While access to a medical doctor may be necessary in certain situations, e.g., Sealock, 218 F.3d at 1210-11, no constitutional violation occurs unless medical care is intentionally or recklessly denied. E.g., Estelle, 429 U.S. at 104-05, 97 S.Ct. 285 (discussing prison guards "intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed").

Here, Washington County supplied qualified nurses, a licensed clinical social worker, and a licensed physician's assistant to provide immediate medical care to inmates. All of these

individuals acted in accordance with the dictates of the Eighth Amendment by promptly and diligently assessing Boyett's medical condition and taking reasonable steps in light of their evaluations. The record is replete with examples of correctional officers notifying the nursing staff about Boyett's medical needs in a timely manner. Those nurses promptly responded to the calls and treated Boyett in a professional way. Physician's Assistant Steele and Licensed Clinical Social Worker Worlton also supplied timely medical care to Boyett. In fact, over a six-day period (August 31 to September 5), Boyett was examined by at least six different staffers with medical training on no less than eight separate occasions. These officials conducted examinations, treated wounds, and administered medications based on their diagnoses.

*6 In short, Plaintiffs have not demonstrated the existence of a genuine issue of material fact pointing to deliberate indifference by any Defendant in failing to provide a qualified medical provider to Boyett.

b. Failure to provide the medicine and care prescribed by Boyett's treating physicians prior to incarceration

[2] Plaintiffs contend the decision by Washington County officials to take away Boyett's prescription Methadone when he entered the facility violated his rights.FN3Boyett's doctor had prescribed the

Methadone to treat his alcohol withdrawal symptoms, but because Methadone is a narcotic, he was not allowed to keep it in the jail. To replace the Methadone, Physician's Assistant Steele prescribed 0.1 mg of Clonidine to be taken twice daily. Steele's prescription of substitute medication for Boyett does not demonstrate deliberate indifference. See Callahan v. Poppell, 471 F.3d 1155, 1160 (10th Cir.2006) ("[A] prison doctor remains free to exercise his or her independent professional judgment and an inmate is not entitled to any particular course of treatment."(quoting Dulany v. Carnahan, 132 F.3d 1234, 1240 (8th Cir.1997))); Perkins v. Kansas Dep't of Corrs., 165 F.3d 803, 811 (10th Cir.1999) ("[A] prisoner who merely disagrees with a diagnosis or a prescribed course of treatment does not state a constitutional violation.").

[3] Plaintiffs also complain officials inadequately treated Boyett's hernia repair. On August 20, Boyett's outside doctor told Washington County officials Boyett had undergone surgery to repair a hernia about one month before entering the facility. Boyett also informed officers and nurses of this fact. When Physician's Assistant Steele conducted a physical examination of Boyett on September 1, she determined he was healed. Even if we assume the diagnosis was both negligent and harmful, Steele's conduct would not rise to the level of a constitutional violation because there is no evidence she acted with the requisite culpable state of mind. See Farmer, 511 U.S. at 835, 114

S.Ct. 1970 ("[D]eliberate indifference describes a state of mind more blameworthy than negligence."). Plaintiffs have failed to put forth evidence Steele knew of "a substantial risk of serious harm," and "consciously disregard [ed]" it. Self, 439 F.3d at 1231.

c. Failure to respond to symptoms and complaints regarding internal bleeding

[4] On August 31, at 12:49 p.m., Boyett told Officer Pitcher he thought he was bleeding internally. Pitcher alerted Nurse McKinnon, but neither McKinnon nor any other nurse responded. Three hours later, Boyett told Officer Ence he thought he was hemorrhaging. Soon thereafter, Nurses McKinnon and Hanson responded and Boyett told them he was going comatose and had spit-up blood. After conducting a thorough examination of Boyett, McKinnon and Hanson concluded Boyett was not lapsing into a coma or suffering from internal bleeding. The nurses instructed Boyett to drink six to eight glasses of water per day.

*7 Although the three-hour delay in responding to Boyett's claims of internal bleeding is troubling, it does not constitute deliberate indifference to a serious medical need because the delay caused Boyett no harm. "[D]elay in medical care can only constitute an Eighth Amendment violation if there has been deliberate indifference which results in substantial harm."Olson v. Stotts, 9

F.3d 1475, 1477 (10th Cir.1993) (quotation omitted); see also Mata, 427 F.3d at 753 (noting prisoner's injury must be "sufficiently serious" to constitute deliberate indifference). Boyett was not experiencing internal bleeding or any other medical problem at that time. The autopsy performed after Boyett's death showed no evidence of internal bleeding or related ailments arising from this incident.

d. Failure to respond to falls and seizures on September 3

In treating Boyett after his fall on September 3, Washington County officials did not violate Boyett's constitutional rights. Nurse McCoy evaluated Boyett soon after the fall and did not discover any serious injuries. Officer Keil, who was also on the scene, did not notice any bleeding or other injuries. Because officials thought the fall was due to a seizure or other medical condition, they transferred Boyett to a medical observation cell for continued monitoring. After Boyett was moved to the observation cell, nurses determined no additional treatment was necessary.

The Purgatory staffers' considered medical judgments did not violate Boyett's constitutional rights. No Eighth Amendment violation can arise from a situation where "a doctor merely exercises his considered medical judgment" and "resolves the question whether additional diagnostic techniques or forms of treatment" are required.

Self, 439 F.3d at 1232;see also Estelle v. Gamble, 429 U.S. 97, 107, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) ("A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice and as such the proper forum is the state court."). None of the officials involved in the decisions to move Boyett to a special cell and refrain from pursuing additional treatment evidenced deliberate indifference to his medical needs. Indeed, the decision to move Boyett to a medical observation cell evidenced concern for-not deliberate indifference to-Boyett's health and wellbeing.

e. Failure to treat Boyett's head laceration

[5] Officers Kounalis and Redford observed Boyett's head laceration the evening of September 5. The laceration likely stemmed from Boyett banging his head against the door of his cell during the prior day's swing shift (3:00 p.m.-11:00 p.m.). Nurse Hanson treated Boyett's laceration by washing it with clean water, and determining sutures were not needed. Social worker Worlton also evaluated Boyett at that time, and determined Boyett appeared psychotic and should be given antipsychotic medication.

Although the Plaintiffs now complain Boyett should have been treated by a doctor or given sutures for his head injury, these post-hoc opinions do not prove Hanson and Worlton

violated the Constitution. Because the injury was not so serious that "even a lay person would easily recognize the necessity for a doctor's attention,"Sealock, 218 F.3d at 1209, Hanson and Worlton were not reckless in their treatment. Hanson made an on-the-spot determination that the laceration did not require sutures. "[T]he subjective component [of deliberate indifference] is not satisfied, absent an extraordinary degree of neglect, where a [prison] doctor merely exercises his considered medical judgment."Self, 439 F.3d at 1232.

f. Improper injection of antipsychotic medication

*8 The prison's use of the antipsychotic drug Thorazine did not violate Boyett's constitutional rights. Washington County officials injected Boyett with this antipsychotic on three occasions. Nurse Hanson administered the first 100 mg injection on September 4, after Hanson concluded Boyett appeared dangerous. Hanson administered a second 100 mg dose on September 5 after he and Worlton jointly determined Boyett appeared psychotic and was a danger to himself and others. Nurse Hummer gave Boyett a third 100 mg injection of Thorazine a few hours later on the evening of September 5.

Each of the three Thorazine injections were made pursuant to a doctor's standing order. While the standing order is not part of the record, Nurse Hummer testified as to the policy's contours.

According to Hummer, Purgatory medical staff had a standing order to inject an inmate with Thorazine when the following three conditions were met: (1) the inmate was dangerous or threatening; (2) injecting Thorazine was the best alternative available; and (3) an individualized assessment of the inmate's medical history weighed in favor of Thorazine treatment. R., Vol. 2 at 524. The Thorazine policy exists primarily to prevent inmates from harming themselves. The policy provides Washington County officials the ability to quickly respond to a dangerous situation, and is administered under the supervision of medical personnel and only given to inmates showing signs of serious mental disturbance.

That the policy allows Thorazine to be administered without inmate consent does not by itself present a constitutional problem. First of all, the record does not suggest that Boyett objected to the drug treatment or that it was administered against his will. Moreover, as the Supreme Court has held, "given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."Washington v. Harper, 494 U.S. 210, 227, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990). This makes good sense, for where an inmate is a danger to himself or others, an involuntary medication policy may be considerably more

humane than a policy disallowing the practice altogether.FN4Prison officials have a duty to care for their inmate population, and using antipsychotic medications is an appropriate medical response in certain situations. Cf. Hogan v. Carter, 85 F.3d 1113, 1118 (4th Cir.1996) (concluding medical personnel, "acting in accordance with sound medical judgment and with the prisoner's best interests in mind," may order an emergency injection of Thorazine); Harper, 494 U.S. at 231, 110 S.Ct. 1028 ("Though it cannot be doubted that the decision to medicate has societal and legal implications, the Constitution does not prohibit the State from permitting medical personnel to make the decision under fair procedural mechanisms."). The jail's Thorazine policy alone does not demonstrate deliberate indifference.

*9 Although Plaintiffs argue a medical doctor should have made the Thorazine decision, they have not shown how this is constitutionally compelled. As we have noted, a prison need not have physicians on site around-the-clock. See Hoptowit, 682 F.2d at 1253;Perkins, 165 F.3d at 811.It is enough that a prison make medical personnel, including doctors, available to help with ongoing medical needs, or meet emergencies. In light of this reality, Washington County's policy provides for prompt action by on-site medical staff, including nurses, licensed clinical social workers, and physicians' assistants. Other medical personnel, including doctors, are available as necessary. See R., Vol. 5 at 1481

(Physician's Assistant Steele testifying her supervising doctor "was available by phone twenty-four hours a day if I had a question").

Nor do we see a constitutional violation based on the manner in which the Thorazine was administered. Boyett's three Thorazine injections were given in accordance with the standing order, which required (1) a determination of dangerousness, (2) Thorazine being the best course of action, and (3) an individualized assessment of the inmate. There is no dispute Nurse Hanson administered the first injection after determining Boyett posed a danger to himself. It also appears Hanson determined Thorazine was the best method of treatment and an individualized assessment of Boyett's medical history weighed in favor of Thorazine treatment. Although strapping Boyett down to a bed or engaging in some other treatment may also have been helpful, there is no indication Thorazine was not the best treatment option.FN5

The second and third injections also complied with the policy. The second Thorazine injection was given by Nurse Hanson on September 5. This injection came after consultation with Licensed Clinical Social Worker Worlton. Worlton had spoken with Boyett's wife regarding Boyett's medical history and consulted Boyett's medical charts before determining Thorazine was the best course of treatment. Nurse Hummer gave Boyett a third shot of Thorazine later that night. Plaintiffs point to no record evidence sufficient to

carry their burden of showing Nurse Hummer ran afoul of the standing order.

Again, nothing in the record suggests that Boyett objected to any of the injections. Thorazine is used in institutional settings and accepted by mentally unstable individuals in precisely Boyett's circumstances. In fact, Plaintiffs concede that, at least for the third treatment, "Boyett was not offensive or combative, and in fact, he complied with the order of the jailers to sit still and allow himself to be injected."Aplt. Br. 22-23.

In sum, Plaintiffs have not shown how Washington County's antipsychotic injections policy or the injections in this case evidenced deliberate indifference to Boyett's medical needs. Plaintiffs have pointed to nothing in the record suggesting Boyett objected to the medication or that the nurses unreasonably believed that Thorazine was an inappropriate means of addressing Boyett's indications of mental illness.

g. Failure to prevent Boyett's death

*10 Finally, Plaintiffs contend prison officials deliberately failed to prevent Boyett's death. Purgatory officials found Boyett dead in his cell on the morning of September 6. We have outlined above the steps taken by prison officials to address Boyett's medical ailments and complaints during the preceding week. On this record, it is obvious jail officials responded reasonably to

Boyett's medical condition prior to his death, and therefore did not violate Boyett's constitutional rights. "[P]rison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause."Farmer, 511 U.S. at 844-45, 114 S.Ct. 1970.

Dr. Leis, the medical examiner, concluded Boyett died of occlusive coronary artery disease. There is no reason to believe any prison official should have been aware of this medical risk. Boyett had not documented the disease on his medical history paperwork, nor had he shown any symptoms of the disease before he died.

Even if Boyett's other medical conditions somehow contributed to his death, Plaintiffs point to no evidence in the record that prison officials: (1) recklessly misdiagnosed or ignored medical problems; (2) delayed providing medical treatment; or (3) denied altogether access to medical personnel or medication. See Self, 439 F.3d at 1232;Mata, 427 F.3d at 753.While Plaintiffs ask us to surmise Boyett was not treated after a cell room assault perpetuated by either prison officials or other inmates, there is no evidence of an assault or that prison officials were aware of these injuries and failed to treat them.

3

In sum, Plaintiffs have failed to point to material disputed facts sufficient to reverse the district

court's grant of summary judgment in favor of Defendants. Plaintiffs have not shown prison officials were deliberately indifferent to Boyett's serious medical needs.

C. Excessive Force

1. Legal Framework

A claim arises under § 1983 if prison officials use force more excessive than necessary to preserve safety and discipline in the prison facility. The core inquiry for an excessive force claim is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."Hudson v. McMillian, 503 U.S. 1, 7, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992); see also Hovater v. Robinson, 1 F.3d 1063, 1068 (10th Cir.1993) ("[A]n inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards.").

An excessive force claim has two prongs: "(1) an objective prong that asks if the alleged wrongdoing was objectively harmful enough to establish a constitutional violation, and (2) a subjective prong under which the plaintiff must show that the officials acted with a sufficiently culpable state of mind."Smith v. Cochran, 339 F.3d 1205, 1212 (10th Cir.2003). To defeat summary judgment, plaintiffs must support their claim with more than conjecture and speculation. E.g., Self, 439 F.3d at 1236."Unsubstantiated

allegations carry no probative weight" in summary judgment proceedings. Phillips v. Calhoun, 956 F.2d 949, 951 n. 3 (10th Cir.1992); see also Bones v. Honeywell Int'l, Inc., 366 F.3d 869, 875 (10th Cir.2004) ("To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise.").

2. Application

*11 [6] Plaintiffs contend prison officials assaulted Boyett while he was in jail. They point to the testimony of three expert witnesses: Drs. Lara, Lovell, and Graham to support their theory. The district court excluded evidence from those experts based on concerns about their reliability under Rule 702 of the Federal Rules of Evidence and Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). After excluding the expert evidence, the district court concluded Plaintiffs failed to establish an affirmative link between the prison guards and Boyett's injuries.

Plaintiffs' theory is that Boyett's rib, rectum, and head injuries were not self-inflicted. They posit Officer Kounalis and perhaps another officer assaulted Boyett sometime between 5:00 p.m. on September 5 and his death the next morning. No direct evidence supports this theory; it rest entirely on (1) an expert report theorizing the injuries could not be self-inflicted, and (2)

circumstantial inferences one of the prison guards must have been alone with Boyett and beat him while no one else was looking. We agree with the district court the record does not support Plaintiffs' theory.

One of the proffered medical experts, Dr. Lara, stated Boyett died as a result of: (1) trauma received prior to his death; (2) oversedation from major tranquilizers of a patient with compromised liver functions; and (3) denial of basic emergency care. Dr. Lara posited Boyett was suffering from liver failure, traumatic injuries (i.e., chest trauma, rectal tear, and internal bleeding), and probable overwhelming sepsis. Dr. Lara also stated videos taken of Boyett before his death showed he was able to lift his arms and move about in a manner that would have been impossible had Boyett been suffering from the injuries discovered at his death.

Another medical expert, Dr. Lovell, opined Boyett's injuries were more likely caused by the guards than by Boyett himself. Dr. Lovell's expert report stated, "The severe wound on posterior scalp is in such a position that it was more likely than not caused by an external blow rather than a fall."R., Vol. 11 at 3390. Dr. Lovell also stated the linear tear in Boyett's anus "was undoubtedly penetration with a blunt foreign body."Id. Nevertheless, Dr. Lovell ultimately agreed with the medical examiner that Boyett died of "cardiac arrest." Id. at 3391.

A former state medical examiner, Dr. Graham, performed an autopsy on Boyett's body more than one month after Dr. Leis's official autopsy had been completed. Dr. Graham's autopsy report contained an "anatomical summary" listing the most important findings of the autopsy. Those findings were: (1) multiple cutaneous contusions and abrasions, including forehead, left hand, right foreleg, right and left foot; (2) multiple rib fractures (L 8, 9, 10, 11), lacerations (parietal pleura), and intercostal hematomas; (3) laceration (anus); (4) multiple scalp contusions; (5) coronary artery atherosclerosis-stenosis; (6) cirrhosis of the liver; (7) pulmonary emphysema; and (8) hematoma (omentum). R., Vol. 11 at 2766. According to Plaintiffs, the conclusion that Washington County officials inflicted serious and deadly injury upon Boyett flows inescapably from the medical observations of these three experts. We disagree.

*12 Even if all three of these experts' testimony and reports were admitted into evidence, there would be no genuine issue of material fact regarding Defendants' use of excessive force. None of these experts supplies evidence tending to show either the mechanism or perpetrator of Boyett's injuries. Plaintiffs have failed in their burden of showing an affirmative link between the injuries complained of and the conduct of the Defendants. See Serna, 455 F.3d at 1152-53 (requiring plaintiff to show an "affirmative link" between the defendant's actions and a constitutional violation);

Ledbetter v. City of Topeka, 318 F.3d 1183, 1187 (10th Cir.2003) (same).

Plaintiffs attempt to overcome their lack of evidence by presenting a theory analogous to the common law notion of res ipsa loquitur."A res ipsa loquitur case is ordinarily merely one kind of case of circumstantial evidence, in which the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it."Restatement (Second) of Torts § 328D, cmt. b (1965). The problem with reliance on this theory is that it can, at most, help Plaintiffs show negligence. Plaintiffs have the burden of proving more than negligence, however; Plaintiffs must prove force was applied to Boyett's body "maliciously and sadistically to cause harm."Hudson, 503 U.S. at 7, 112 S.Ct. 995.A finding of negligent medical care provides no help in that regard.

Evaluating all three of these experts' testimony, along with the rest of the evidence in the record, we conclude the expert testimony and circumstantial evidence fail to raise a material question of fact as to whether Officer Kounalis or another officer assaulted Boyett. The reports focus on the extent and severity of the injuries, while almost entirely omitting their causes (other than to suggest they were not self-inflicted). While the injuries are undoubtedly troubling, and their origins a mystery, the experts provide no evidence on the crucial question of whether one of the Defendants committed them.FN6In fact, Plaintiffs

point to no evidence in the record tending to show that either Kounalis or another officer was alone with Boyett at a time they could have committed the injuries.

In contradistinction to Plaintiffs' unsupported theory, the record evidence suggests Boyett was never physically abused. The evidence shows: (1) Officer Kounalis discovered Boyett's head injury at 5:00 p.m. on September 5; (2) Officers Kounalis and Redford transported Boyett to the infirmary for treatment; (3) Boyett did not complain of rib or rectum injuries to anyone at that time; (4) Boyett was on powerful pain medication (500 mg of Naprosyn) for other ailments; (5) Boyett was given a Thorazine injection and placed in a suicide watch cell at 7:45 p.m.; (6) the suicide watch cell, located directly behind the booking station, is the most public place in the prison; (7) the suicide watch cell was monitored at all times by two officers at the booking station; and (8) Boyett was observed walking around his cell and using the toilet several times between midnight and 3:00 a.m.FN7 The evidence does not show how any Defendant had the time or opportunity to inflict severe wounds upon Boyett in the hours immediately preceding his death.

*13 In sum, the Boyett family has not pointed to sufficient record evidence to support their theory Officer Kounalis or another Defendant inflicted fatal injuries on Boyett the night of September 5. At the summary judgment stage, Plaintiffs must point to facts that show a particular Defendant

caused the injuries with a culpable state of mind. See, e.g., Bones, 366 F.3d at 875 ("To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise."). They have failed to do so here.

D. Supervisory Liability

To hold a supervisor liable under § 1983, a plaintiff must show the supervisor's deliberate, intentional conduct amounted to a violation of plaintiff's constitutional rights. Government officials are not vicariously liable for the misconduct of their subordinates. "There is no concept of strict supervisor liability under § 1983."Serna, 455 F.3d at 1151 (quoting Jenkins v. Wood, 81 F.3d 988, 994 (10th Cir.1996)). The supervisor must be "personally involved" in the constitutional violation. Id.

Plaintiffs have failed to present any evidence Sheriff Smith or Chief Nurse Patt used excessive force or evidenced deliberate indifference rising to the level of a constitutional violation. They have not even attempted to show how these county supervisors were personally involved in any constitutional violation. Accordingly, we affirm the grant of summary judgment in favor of both supervisor Defendants. See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (noting summary judgment is appropriate when nonmovant "fails to make a

showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial").

III. Municipal Liability

Municipalities are not vicariously liable for the misconduct of their employees. Municipal liability may be imposed under § 1983 only if the municipality itself is responsible for the constitutional violation. City of Canton v. Harris, 489 U.S. 378, 385, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). As relevant here, a municipality may be responsible for a constitutional violation when: (1) individuals with final decision-making authority for the municipality create an unconstitutional policy or practice, or (2) the municipality's failure to train its employees reflects a deliberate indifference to constitutionally protected rights. See id. at 389, 109 S.Ct. 1197.In either case, the municipality must be the "moving force behind the constitutional violation."Id. (alterations omitted).

Plaintiffs base their claims of municipal liability on two Washington County policies. Neither violates the Constitution.

The first policy is the county's supposed policy or practice of refusing to treat the wounds and ailments of Purgatory Correctional Facility inmates. There is no evidence of this policy or

practice. Instead, the county's policy was to have a full-time nursing staff, as well as a part-time physician's assistant, on site at the facility. Other medical personnel, including Steele's supervising physician, were on call. In light of our conclusion that county employees appropriately evaluated and treated all of Boyett's known ailments while he was incarcerated, this policy cannot support a claim of municipal liability.

*14 [7] The second policy is the county's allegedly unconstitutional decision to allow Purgatory officials to inject inmates with Thorazine in unknown amounts and frequency and without keeping adequate records. Plaintiffs' claim fails because they have not shown that-if in fact a policy to underreport exists-the policy was causally related to Boyett's injuries. See, e.g., Harris, 489 U.S. at 391, 109 S.Ct. 1197 (noting that "for liability to attach ... the identified deficiency in a city's training program must be closely related to the ultimate injury").

Boyett died either of a combination of trauma, broken ribs, and lack of medical treatment (Plaintiffs' theory) or a heart attack (Dr. Leis's conclusion). In neither case was the injection of an antipsychotic medication a cause of his injuries or death. Indeed, Dr. Leis's uncontroverted autopsy report showed no elevated levels of any medications or other drugs in Boyett's body, and none of Plaintiffs' expert witnesses opined that Thorazine directly caused Boyett's death. Nor do any of the Plaintiffs' allegations, even if true,

point to a policy of deliberate indifference to Boyett's serious medical needs. Plaintiffs have thus failed to meet the threshold standard of culpability and causation required to hold the county liable. Carr v. Castle, 337 F.3d 1221, 1231 (10th Cir.2003) (recognizing plaintiffs seeking to impose municipal liability must prove a municipal policy "actually caused" their injuries); Lopez v. LeMaster, 172 F.3d 756, 760 (10th Cir.1999) (holding plaintiff "must prove that the [county's] deficiency in training actually caused his jailer to act with deliberate indifference to his safety").

Plaintiffs' two claims against Washington County fail for an additional, independent reason: the lack of a constitutional violation by any of the county's employees. Without proof of an underlying constitutional violation by a county employee, there can be no county liability based on a county policy. See City of Los Angeles v. Heller, 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) (per curiam) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point."); Estate of Larsen ex rel. Sturdivan v. Murr, 511 F.3d 1255, 1264 (10th Cir.2008) ("[W]ithout the predicate constitutional harm inflicted by an officer, no municipal liability exists.").

IV. State Law Claims

The district court declined to exercise supplemental jurisdiction over the Plaintiffs' state law claims. By failing to specifically point to any error in the district court's decision, they have waived review of this issue on appeal. See, e.g., Hernandez v. Starbuck, 69 F.3d 1089, 1093 (10th Cir.1995) (noting appellant has the burden of drawing this court's attention to error below and court will not manufacture a party's arguments on appeal).

V. Conclusion

*15 For the reasons set forth above, we AFFIRM the district court's decision.

Entered for the Court,

Timothy M. Tymkovich
Circuit Judge

FN* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

FN1. Boyett's inmate request form stated, "I need a request to have my mother's liver transplanted

into me and then bury my mother here in LaVerkin, UT."R., Vol. 5 at 1549.

FN2. Plaintiffs' brief is far from a model of clarity; nevertheless, we have attempted to discern the main arguments. We believe any additional claims-such as Defendants' failing to follow medical conditions imposed upon the jailing of Boyett, failing to provide adequate and proper medication, and failing to examine Boyett's medical records (Aplt. Br. 28)-are encompassed within the seven broad claims we have laid out above.

FN3. Boyett was also taking Celexa and Xanax before he entered the Washington County facility. Plaintiffs have failed to show whether these were prescribed by Boyett's doctor and, if so, whether they were taken away by Washington County officials. Plaintiffs have therefore waived review of any claim with regard to these drugs.

FN4. We note that if prison officials had not given Boyett the Thorazine injections after witnessing his self-destructive behavior, Plaintiffs may have alleged Defendants were deliberately indifferent in failing to protect Boyett from himself. See Hogan v. Carter, 85 F.3d 1113, 1118 (4th Cir.1996) (concluding if prison doctor "had not ordered the single dose of Thorazine" to mentally deteriorating prisoner "it is not unlikely that [doctor] would now be facing a lawsuit by

[prisoner] claiming that he was deliberately indifferent to his serious medical needs").

FN5.See Steven K. Erickson, The Myth of Mental Disorder: Transsubstantive Behavior and Taxometric Psychiatry, 41 Akron L. Rev. 67, 101-02 (2008) (describing "[t]he introduction of Thorazine" as "monumental to psychiatry" because "it brought hope to the severely mentally ill in a manner that was manifestly obvious"); Thomas G. Gutheil, M.D. and Paul S. Appelbaum, M.D., "Mind Control," "Synthetic Sanity," "Artificial Competence," and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication, 12 Hofstra L. Rev. 77, 93-97 (Fall 1983) (noting cases in which a defendant was given Thorazine to regain cognitive functionality, sanity, and/or competency to stand trial).

FN6. Evidence in the record suggests Boyett fell down some stairs on September 3 and may have injured his ribs and rectum then. The record also suggests Boyett's head wound was caused by Boyett repeatedly beating his head against the observation cell's wall or bars.

FN7. Plaintiffs suggest Defendants conspired to conceal the beating, but this theory of group liability is not supported by the record. Instead, the record shows extensive attention to Boyett's medical needs for the entire period of his incarceration. The jail-house documentation that exists shows Boyett was monitored throughout

the evening of his death, and no one had the opportunity to assault him while he was in the prison's suicide watch cell.

United States Court of Appeals for the Tenth Circuit

FILED JULY 22, 2008

SANDRA BOYETT, individually, and as personal representative for the estate of Raymond Boyett, et. al.,

Plaintiffs-Appellants,

v.

WASHINGTON COUNTY, a political subdivision of the State of Utah, et. al.

Defendants-Appellees

No. 06-4315

ORDER

Before HENRY, Chief Judge, EBEL, and TYMKOVICH, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judge s of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elisabeth A Schumaker
Elisabeth A. Shumaker, Clerk